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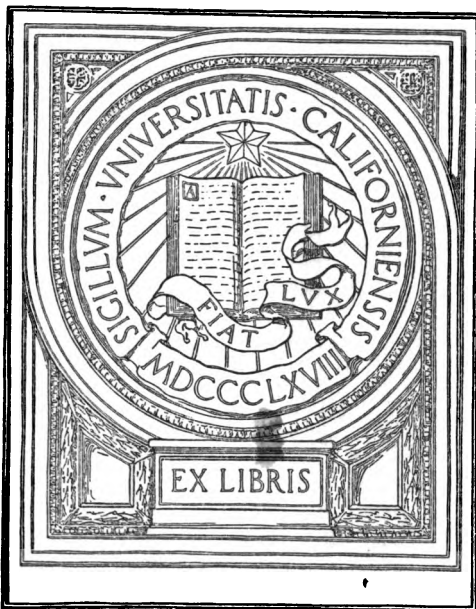
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BERKS COUNTY LAW JOURNAL

VOL. 10

CONTAINING CASES DECIDED BY THE

Courts of Berks County Pennsylvania

REPORTED BY
RANDOLPH STAUFFER
AND
WELLINGTON M. BERTOLET
MEMBERS OF THE BERKS COUNTY BAR

521 COURT STREET, READING, PA.
OCTOBER 1st, 1918

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During the period of these reports.

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GEORGE W. WAGNER.....Judge

ORPHANS' COURT.

HARRY D. SCHAEFFER.....President Judge

District Court of the United States for the Eastern District of
Pennsylvania.

SAMUEL E. BERTOLET, Referee in Bankruptcy.

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No. 1

NOLDE vs. NOLDE et al.

Equity Practice—Proceedings for Support by Deserted Wife—Service Outside Jurisdiction—Acts 6 April, 1859, P. L. 387; 23 May, 1907, P. L. 227; and 21 July, 1913, P. L. 867—Constitutionality—Legacy as Property.

Plaintiff filed a bill in equity against her husband and the executors of the will of his father, alleging desertion and non-support by her husband and asking for a decree that a suitable amount out of a legacy to which he was entitled under the will of his father should be taken and become liable for her comfortable support and maintenance. Upon plaintiff's affidavit that her husband was residing at Carrara, Nevada, the Court made an order for service of the bill and copy of the order upon him there under Act 6 April, 1859, P. L. 387, in accordance with the provisions of Act 23 May, 1907, P. L. 227, as amended by Act 21 July, 1913, P. L. 867. Upon return of the service counsel for the husband, *de bene esse*, moved to have the service set aside on the ground (1) that the property against which the proceeding was directed consisted of a legacy and was therefore not the kind of property designated in the Act of 1859, concerning which the manner of service is therein provided; (2) that service was effected on defendant in Tonopah, Nevada, instead of Carrara; and (3) that the Acts of 1859, 1907 and 1913, in so far as they be considered to authorize service outside the jurisdiction are at variance with the constitution and laws of the United States, and are void.

Held: sustaining the service, that (1) the kinds of property designated in the Act of 1859 are without significance, as the Act of 1913 provides that "proceedings may be had against any property, real or personal, of said husband," which includes a legacy, though not yet distributed, because a legacy is property and vests in the legatee upon the death of the testator; and the Act of 1913 refers to the Act of 1859 only to direct that service shall be made in the manner provided by that Act; (2) that service on defendant at Tonopah instead of at Carrara, both being in the same county in Nevada, was proper, though the order for service referred to Carrara. The Act of 1859 provides that the order for service shall be made after it shall be made to appear to the Court by affidavit in what place or county such defendant resides or is or probably may be found, and authorizes the Court to direct that service be made wherever he may reside or be found. The order directing service to be made "at the place aforesaid," referring to Carrara, contained a requirement not provided for in the Act of 1859; (3) that the Acts of 1859, 1907 and 1913 are not unconstitutional for the reason that the proceeding is *in rem* and not *in personam*, and is against property within the jurisdiction of the Court. The purpose of the order for service was not to bring the defendant within the jurisdiction, but to give him notice to defend his property, if he had any defence.

In the Court of Common Pleas of Berks County: In Equity.

No. 1184 Equity Docket, 1916.

Motion to set aside service.

Harry F. Kantner and Cyrus G. Derr for defendants and motion.

William B. Bechtel for plaintiff.

Opinion by Wagner, J., July 2, 1917.—In the bill filed in this case the plaintiff avers that she was married to George H. Nolde, one of the defendants, and that thereafter they lived and cohabited together as man and wife in the City of Reading, Pa. That on September 16, 1915, at Reading, Pa., George H. Nolde, without reasonable cause whatever separated himself from her. That since this separation he has neglected and refused, and still neglects and refuses to provide any maintenance whatever for her. That on November 22, 1916, Jacob Nolde, late of Reading, Pa., died testate, and in his will he gave and bequeathed unto George H. Nolde the following legacy in these words:

"Thirty thousand dollars (\$30,000) thereof, I give and bequeath unto my beloved son, George H. Nolde, to be his property absolutely and to be his full share and interest in my estate."

The plaintiff prays the Court to determine and decree a suitable amount for her comfortable support and maintenance out of the aforesaid legacy bequeathed to George H. Nolde, and that this amount be taken and become liable for that purpose.

It will be seen that this is a proceeding in equity for the support of the wife out of property situate here, which property is now in the hands of Lee M. Erdman and the Reading Trust Company, executors of Jacob Nolde, deceased, and which George H. Nolde is entitled to have paid to him upon the adjudication of the estate of his father, Jacob Nolde, deceased.

In the bill the plaintiff averred that the whereabouts of the defendant, George H. Nolde, were to her unknown since the date of the separation. The Court, upon the petition and affidavit of the plaintiff, on December 11, 1916, ordered that service be made of the bill by publication, in accordance with the Act of April 6, 1859, P. L. 387, as provided for by the amending Act of 1913, P. L. 867. On January 5, 1917, Lee M. Erdman and The Reading Trust Company, executors aforesaid, filed their answer, wherein they averred that since March, 1916, George H. Nolde has been a citizen of the State of Nevada and that his present place of residence is Carrara, Nevada. Thereupon, upon motion of plaintiff's counsel, the order of service by publication was revoked, and, upon the affidavit of the plaintiff, the Court ordered that the bill of

complaint with a copy of this order, be served on George H. Nolde at the place aforesaid, in accordance with the provisions of the Act of 1859, supra. Upon return of the service, counsel, who appeared de bene esse for George H. Nolde, objected to the service, and assigned eight reasons to set it aside. These can be considered under three heads.

Counsel for defendant contends that the property against which this proceeding is directed consists of a legacy and is, therefore, not that kind of property designated in the Act of 1859, supra, concerning which, in a suit in equity, the manner of service is therein provided. That is, defendant contends that a legacy is not goods, chattels, lands, tenements or hereditaments, and, therefore, service cannot be made under this act.

The Act of 1859, inter alia, directs the manner of service in suits in equity, concerning property there specified. In a suit in equity of this nature, that is, a proceeding in rem for the support of the wife, we have nothing to do with the kinds of property, that is, goods, chattels, lands, tenements or hereditaments mentioned in the Act of 1859. We have merely to do with that part of the Act which provides for service. For the purpose of determining whether a legacy can be proceeded against, we must go to the amended second section of the Act of 1913, supra, which provides that "proceedings may be had against any property, real or personal, of said husband necessary for the suitable maintenance of the said wife." The only question then is whether a legacy is "any property, real or personal." In *Sinnickson et al. vs. Painter*, 32 Pa. 384, the Supreme Court, on p. 386, say: "By death, the property of the decedent passes to those to whom it is given by his will, or if he leaves none, to those persons designated by the intestate laws of the state. If it be land, it vests immediately in the devisee or heir; if a legacy or distributive share, it vests in the legatee or next of kin, although the payment is postponed in order that the situation of the decedent's estate may be fully known. Legacies, if no time be limited for their payment, are due and payable at the expiration of a year from the death of the testator, and if the executor has in his hands sufficient assets to pay all the just debts and legacies, he is bound to pay them without further delay. The right to the distributive share exists from the moment of the death of the intestate, but its payment is delayed for a year, and until, under the provisions of the law, its amount is ascertained. Legacies and distributive shares may be conveyed or disposed of by assignment, or by last will, and in case of death without a will, will pass to the next of kin of the intestate, although the year has not elapsed, and no account has been settled by the original executor or administrator."

As property, a legacy has been made the subject of foreign attachment by the Act of 27 July, 1842. Thirty thousand dollars, property of the decedent, Jacob Nolde, immediately upon his death, passed to his son, George H. Nolde, and is personal property payable to him one year after the death of the testator. We consider that a legacy is property under the Act of 1913, and can be seized under the provisions of said Act, for the proper support and maintenance of a wife. The provision in the Act which further directs "and the Court may direct a seizure and sale, or mortgage," means merely a sale or mortgage where that sale or mortgage is necessary for the purpose of procuring the money for the support of the wife. Where that which is proceeded against is money, all that is necessary, for the purposes of this Act—that is, maintenance of the wife—is a seizure. Where the legatee agrees to accept payment of the legacy in property other than money both seizure and sale may be necessary.

The second head under which the reasons for setting aside the service can be considered, is that the return of service shows that same was made not in Carrara, Nevada, but in Tonopah, Nevada. The Act of 1859 provides that when the order by the Court is made for the service of a subpoena that "it shall appear to such Court by affidavit, affidavits, or other documents applicable for the purpose, before making such order, in what place or county such defendant or defendants reside, or are or probably may be found." The affidavit to the Court upon which the order for service in this case was based, stated that until the filing of the answer of the two defendants, to wit, Lee M. Erdman and The Reading Trust Company, executors, on January 5, 1917, the residence of George H. Nolde, even though diligent inquiry had been made, was unknown to the plaintiff, but from the knowledge and information imparted to her by the answer she ascertained and knew for the first time since her separation from her husband, that he resided and might probably be found in Carrara, state of Nevada.

The affidavit complies with the provisions of the Act. The purpose of this affidavit as to the place where defendant resides, or is, or probably may be found, is to enable the Court to determine the limit of time, depending on the place where such process is to be served, after the service thereof, within which compliance with the requirements thereof must be made by the defendant.

The order for service made by the Court on January 15, 1917, orders that the bill of complaint with a copy of the order be served on George H. Nolde at the place aforesaid, referring to Carrara, state of Nevada. Nowhere does the Act provide that when the affidavit is made as to where a

defendant resides or probably may be found that the Court shall then order that service be made at the place where the affidavit says that he resides or probably may be found. When, upon motion of plaintiff's counsel, this Court made the order for service at Carrara, Nevada, it incorporated therein a requirement not provided for in the Act of 1859. All that the Act provides is that the Court "order and direct that any subpoena, subpoenas, or other process to be had in such suit, be served upon any defendant or defendants therein, then residing or being out of the jurisdiction of such Court, wherever he, she or they may reside or be found." When, therefore, service was made upon the defendant at Tonopah, Nye County, state of Nevada, the Act was fully complied with, even though the affidavit, upon which the order of service was based, stated that the defendant resides or probably is at Carrara, state of Nevada, Carrara being also in Nye County.

The third head under which the reasons for setting aside the service can be considered is that there was no law in Pennsylvania which authorized the making of the order of January 15, 1917, by service of the bill upon the defendant beyond the limits of Berks County. That is, that the Pennsylvania statutes of April 6, 1859, P. L. 387, Act of May 23, 1907, P. L. 227, and amendments thereof, in so far as they may be considered to authorize service upon the defendant, George H. Nolde, in the state of Nevada, are at variance with the constitution and laws of the United States and void.

As has already been said, this is not a proceeding in personam, but is a proceeding in rem. That is, against property within the jurisdiction of this Court. The purpose of the order made on January 15 was not to bring the defendant, George H. Nolde, within the jurisdiction of this Court. Its purpose was merely to give him notice to defend property which is within the jurisdiction of this Court from being taken for the support of his wife if he had any defense against such a proceeding. In *Erdner vs. Erdner*, 234 Pa. 500, where, in a proceeding of this kind, the question arose as to the validity of service by publication, under the Act of 1859, Mr. Justice Moschzisker, on p. 506, says: "Under the service in this case the Court had power to direct a sale or mortgage of so much of defendant's estate as might be necessary for the maintenance of the plaintiff, but before so doing it should first have determined what amount would be suitable, and, next, what property of the defendant should be taken for that purpose; then it could have decreed a sale or mortgage accordingly. Since the property affected was within the jurisdiction, service by publication was sufficient, and we cannot say that the

notice was lacking in any essential detail." We cannot see any merit in any of the reasons assigned to set aside the service in this case.

Motion to set aside service is discharged.

SCHELL vs. SCHELL.

Divorce—Cruel and Barbarous Treatment and Indignities to Person by Wife—Evidence.

A husband filed a libel in divorce against his wife on the ground of cruel and barbarous treatment and indignities to person. He testified that they were married in 1875 and separated in 1911; that his wife had refused to get his breakfast, called him uncomplimentary names, that they had quarreled at his father's funeral, that in 1899 she had knocked him down with a frying-pan, that shortly before he left her she threatened to use a butcher knife on him if he came into her sleeping-room, that she threatened to throw vitriol in his face if she caught him with other women, that she refused to occupy the same sleeping-room with him and quarreled with him almost daily. At a subsequent hearing he testified as to certain unnatural practices he claimed his wife requested of him. The respondent and two sons contradicted this testimony. Libellant admitted that when one of his children was a week old and the respondent still sick in bed he had a dispute with his mother-in-law, whereupon he left the house and stayed away two and a half years and contributed to their support only after he was brought into Desertion Court. At another time he left his wife and children without making provision for their support. The respondent's witnesses testified to many acts of libellant against respondent.

HELD: That libellant had failed to establish by evidence the truth of the allegations contained in his libel, and that the libel should be dismissed.

In the Court of Common Pleas of Berks County.

No. 12 June Term, 1916.

Divorce: Exceptions by respondent to Master's report.

Rothermel & Mauger for respondent and exceptions.

Lee Friday for libellant.

John K. Hahn, Master.

Opinion by Wagner, J., July 25, 1917.—In this proceeding in divorce the Master recommended that a decree be entered in favor of the libellant upon the ground charged in the libel, that is, cruel and barbarous treatment and indignities to person; that no alimony be allowed to the respondent, and that she pay the costs. To this respondent has filed a number of exceptions relating to the insufficiency of the evidence to sustain the allegation of the libel.

We have made a careful examination of the evidence submitted in this case. The first hearing was held on Decem-

ber 1, 1916. At this hearing Charles K. Schell, the libellant, testified that they were married on December 4, 1875, and that the final separation occurred on August 28, 1911. At this time the only testimony that libellant submitted in support of his allegation of cruel and barbarous treatment and indignities to his person, as he claimed during the thirty-six years of his married life, was that his wife had refused to get his breakfast that she called him a whore bull; that at one time they had a quarrel at his father's funeral; that in 1899 she had knocked him down with a frying pan; that about three months before he left her she had threatened to use a butcher knife on him if he came into her sleeping room; that she said if she caught him with other women she would throw vitriol in his face; that she had at one time said she would put something in his coffee; that she refused to occupy the same sleeping room with him, and that she almost daily quarreled with him.

The credibility and weight of his testimony, especially since he is contradicted by the wife and two sons in all these matters, must be considered in the light of the admissions of his own conduct during this period of time, and the denials of the respondent and her witnesses.

He testified that on December 1, 1881, when one of his children was but a week old, and his wife was still sick in bed, he had a slight dispute with his mother-in-law about the spilling of some coal-oil. Upon this slight provocation he left his sick wife and one-week-old child without making any provision whatever for their support, remained away for two and a half years, and contributed to their support only after he was arrested and brought into the desertion Court. Again in 1895 he left his wife and children, did not tell them where he was going, and made no provision for their support. What he said to his family was, "I am going on board ship and am going to the bum—good-bye."

At the second hearing the libellant testified more strongly to the alleged matters of cruel treatment. In addition to what he had testified at the first hearing, he gave evidence of certain unnatural practices that he claimed his wife requested of him. It seems strange to us that a matter of such importance in a case of this kind, as this matter of alleged unnatural practice, was not testified to at the first hearing.

Susan Schell, a daughter-in-law, testified that from June, 1889, to January, 1890, she lived in the home of libellant and respondent. She stated that when the husband did not give his money over to his wife she asked for it; that whenever he would go away she would say, "Now, he is going to see his whores;" and that "they had mouth fights quite often."

Libellant seems to lay a great deal of stress, in support of his ground for divorce, upon the allegation that the respond-

ent did not get up in the morning to get breakfast for him before he went to his work. The testimony is that he generally rose at about five o'clock in the morning. This witness says that the wife prepared everything for his breakfast and lunch the evening before, and the next morning he put it into the kettle himself, "so it would not be in the kettle so long." When asked by the Master who started the quarrels, she answered, "She did many a time."

Louise Folk, another of libellant's witnesses, from the testimony, appears to be a deaf and dumb person who had to be spoken to in the German language, and the person who spoke to her at the hearing could not interpret the oath to her in this language. When the interpreter asked how long she lived in this family, we have this note: "The interpreter is unable to make the witness understand how long she lived in the family." Her testimony amounts to nothing, and is unworthy of consideration. Yet when counsel for respondent asked for an agreement that her testimony be stricken out upon the ground that she did not seem to understand what had been said, counsel for libellant answered: "I dare not strike out any testimony; the Court must pass upon it."

Mrs. Edna Bausher, another of libellant's witnesses, knew libellant and respondent for about ten years. During this time she, in the evening, visited them on an average of twice a week. She testified that the respondent stated to her that the libellant "went out whoring." When asked if they quarreled, her answer was, "they had words," and that respondent started these words. When asked how frequently the wife had spoken to him in these terms—meaning calling him names—she answered, "not often." When asked how often he went out of the house on account of quarrels, she answered, "Twice that I know of." Very many of the material questions that were asked of the witnesses were of such a leading character that had they been asked in a court they would, for this reason, have been ruled out.

Emma Gross, another witness for libellant, testified that she was the divorced wife of one of the sons, Luther, and that she lived with the family about a year. She says that respondent was always quarreling and fighting; that she called him foul names; that Mrs. Schell threatened Mr. Schell, saying if he came into her room she would kill him; that she accused him of running around with other women. Her animus was shown by her answers on cross-examination (p. 23).

Evidence was submitted to show that the respondent had cause to complain of libellant's relations with one, Sallie Moyer, prior to the time of the final separation. Letters were offered, which from the evidence, we find to have been written by Sallie Moyer. Yet the Master ignores all the testimony relat-

ing to the authenticity of the handwriting as being that of Sallie Moyer, by implicitly accepting her word. In his report he says that Sallie Moyer denies the handwriting of the letters and that she sent them to libellant. He concludes his finding by saying that certainly she knows her handwriting better than any one else. You would hardly expect a woman who had been criminally intimate with another's husband in a bed house as this one had been with this libellant, even though after the last separation, to admit to letters that had been written by her to him prior thereto.

Respondent and her witnesses, including several of the sons, deny all the allegations of cruelty and indignities testified to by libellant and his witnesses. They, on the contrary, give evidence of numerous acts done by this libellant to the respondent which would bring one to the conclusion that the cause of complaint was with the wife and not with the husband. We fail to see, after a careful examination and consideration of this testimony, how the Master accepted as verity, as indicated by his report, every item of testimony given by the libellant and his witnesses and entirely ignored and found as untrue that of respondent and her witnesses. Our finding is that whatever quarrels they had were brought about more by libellant's conduct than by that of respondent, and that libellant has failed to establish by evidence the truth of the allegations contained in his libel.

We sustain the respondent's exceptions to the Master's report and dismiss the libel.

WANNER vs. P. & R. RAILWAY CO.

In the Court of Common Pleas of Berks County.

No. 106 August Term, 1916.

Rule for judgment n. o. v.

Snyder, Zieber & Snyder for defendant and rule.

John B. Stevens for plaintiff.

Railroads—Crossing Accident—Negligence—Contributory Negligence—Question for Jury.

Plaintiff sued defendant to recover damages for the death of her husband from injuries received in a grade crossing collision between a train on defendant's railroad and a hired automobile in which he was riding. The evidence showed that the crossing was a particularly dangerous one. It appeared that the engine whistle was sounded at the whistling post 1,326 feet distant from the crossing, but the evidence as to the ringing of the bell was conflicting. The case was submitted to the jury, which found a verdict for plaintiff. On rule for judgment

n. o. v., **Held:** That it was a question for the jury whether the engine bell was rung and whether the warnings given by the approaching train were sufficient to show due care under the circumstances. **Held,** further, that the contributory negligence, if any, of the driver of the automobile could not be imputed to the passenger, unless the danger was manifest, and the passenger, by his failure to object, joined the driver in testing such danger. Whether or not the danger was manifest was a question for the jury.

Railroads—Negligence—Sufficiency of Warning Signal.

It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case such a signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway.

Contributory Negligence—"Stop, Look and Listen" Sign—Unusual Location of Sign.

Where a railroad crossing is approached over a covered bridge spanning a stream, the far approach to which is by a steep road running at right angles to the bridge entrance, the Court cannot say as a matter of law that a passenger in an automobile is negligent for not observing a "stop, look and listen" sign fastened to the side of the bridge entrance at the height of the rafters, about 9 feet from the ground. The place was an unusual one for such a sign and was facing the occupants of the car only when they were making the right angle turn into the bridge, when their attention would naturally be directed to observing conveyances coming from the bridge.

Opinion by Wagner, J., July 25, 1917.—Plaintiff brought suit against the defendant company for damages on account of the death of her husband on July 30, 1915. On this date the automobile in which plaintiff's husband was seated was struck by defendant's engine at a railroad crossing 95 feet from the station at Moselem. The jury returned a verdict for the plaintiff for \$6,000. The defendant entered a rule for judgment n. o. v. It has not filed any reasons for a new trial. The only question therefore to be considered is whether this was a case for the jury.

This defendant contends that its point for binding instructions should have been affirmed, first, on the ground that the evidence disclosed no negligence on the part of the defendant. "Negligence is the absence of care according to the circumstances, and must be measured by the apparent danger." *Bickel vs. Penna. R. R. Co.*, 217 Pa. 460, 461. What then were the circumstances in the consideration of which it is to be determined whether or not the defendant company was negligent?

The deceased, with others, at the time of the accident, was driving in an automobile on a frequently traveled road leading from Reading to Virginsville. The automobile was traveling at a rate of from 15 to 20 miles an hour. The train which struck the automobile was traveling at a rate of about 18 miles an hour, and going in a direction opposite to that in which the automobile was going. The railroad crossing, where the accident happened, was distant from the outlet of

a covered bridge through which the automobile had passed, 30 to 31 feet. This covered wooden bridge was 155 feet 4 inches long. At the entrance of the bridge farthest from the railroad crossing, where the auto entered, was a sharp right-angled curve on a steep grade. Mengel, the driver of the automobile, testified that at this entrance the road is hardly wide enough for two machines to travel. The Division Superintendent Brand testified that in width the inside clearance of the bridge was 13 feet 6 inches. This covered bridge had no openings along the sides, so that the occupants of the car, from the time they entered the bridge, 185 feet away from the crossing, until they emerged therefrom 30 feet from the crossing, had their view to the outside entirely obstructed. The civil engineer in the employ of defendant company testified that in the 160 feet of the road just before entering the bridge there is a grade of 6½ feet, and in the last 50 feet a grade of 3.3 feet. This road before coming to this steep grade and right-angled curve, passes for some distance along the Maiden creek. The Maiden creek was to the right as deceased approached the bridge, with a high hill along the left (N. of T. pp. 86, 88, 89). This clearly was not the ordinary grade crossing, but an extremely dangerous one. The defendant's precautions as to the signaling of approaching trains had therefore to be proportionate to this danger. Eight hundred feet north of the railroad crossing in the direction of the approaching train was a deep cut about 300 feet long. The whistling board was 1,326 feet north of the crossing. The engineer, members of the crew and others, testified that the whistle was blown, two short and two long, near the whistling board, several of them before they approached the board, and the last about 100 or 150 feet after he had passed it.

Defendant contends that if the defendant company blew the whistle as testified to at this place, that then it did its full duty, and could not be convicted of negligence. As authority therefor, counsel cites *Reading, &c. R. R. Co. vs. Ritchie*, 102 Pa. 425; *Longenecker vs. Penna. R. R. Co.*, 105 Pa. 332. Neither of these cases go to the extent contended for by defendant's counsel.

In *Bickel vs. Penna. R. R. Co.*, supra, we have it expressly stated, on p. 462: "It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway." There would seem to be no question from the evidence in this case, but that at this whistling post the engineer had given the signal testified to. Kerns, one of plain-

tiff's witnesses, stated that he was at the far end of the bridge, heard the whistle, and, thinking that it was the passenger train, ran through the bridge for about three-fourths of its distance, then walked the balance of the way to the station, threw the signal, "sat down, and then the train was coming." There is no claim that the whistle was sounded at any other place than the whistling post. Several of the occupants of the automobile testified that as they approached the bridge, and while they were crossing the bridge, the whistle was not sounded; neither did they hear the whistle. This, however, does not contradict the evidence that the whistle was sounded at the whistling board. The automobile and the train were traveling at about the same rate of speed. Consequently when the whistle was sounded 1,326 feet north of the crossing, the automobile must have been on the other side of the bridge, about the same distance south of the crossing, or one-half mile away from the place where the whistle was sounded. The question then is, whether in these days of travel with an automobile, at a very dangerous place, such as this clearly was, the signal given was a timely, sufficient and adequate warning of the approach of the train. That the defendant company did not consider it so, is shown from the testimony of John S. Newcomet, the fireman on this train at the time the accident occurred, who testified that for a distance of 200 or 300 feet north of the crossing he had rung the bell (N. of T. p. 64). When asked by defendant's counsel, "Whose duty was it to ring the bell?" we have the answer, "The rules don't say who shall ring the bell. The rules says the bell shall be rung." What, therefore, was said by Mr. Justice Mestrezat in *Bickel vs. Penna. R. R. Co.*, supra (p. 459), applies here: "By making a rule requiring it, the defendant company shows that it regarded the signal at that place as necessary to protect the public who had occasion to use the crossing." Whether the bell, which was thus considered necessary by the defendant company, was rung for this distance, even if that was sufficient and adequate for this dangerous place, was clearly a question for the jury.

The only person who testified that the bell was rung was Newcomet, the fireman. The engineer could not say that the bell was rung, nor did any of the other members of the train's crew, who were seated in a car just four car length's away from the engine. Mengel, the driver of the automobile, says the bell was not rung. Mrs. Karbel and Mrs. Myers, two of the occupants of the car, also say that the bell was not rung, and Kerns, the man who ran across the bridge and was standing at the station when the train passed, and whose attention was attracted to the approaching train because he had at first thought it was the passenger train upon which he desired to return to Reading, stated that although standing

aside of the train as it passed, and having his attention on it, he did not hear the bell rung. His testimony is more than negative testimony. The jury, therefore, from the evidence, was fully warranted in finding that whilst the whistle was sounded at the whistling board, the bell, as required by defendant's rule, was not rung. In view of the attending circumstances as we have stated them, we are of the opinion that it was for the jury from this evidence to determine whether the defendant company had given timely, proper, sufficient and adequate warning of the approach of its train by the mere blowing of the whistle 1,326 feet away from this dangerous crossing.

The second ground upon which defendant claims that the point for binding instructions should have been affirmed, is that the plaintiff's husband was so clearly guilty of contributory negligence that the court upon that ground alone should have affirmed it.

In determining the deceased's negligence we must again consider the circumstances of the case. As far as the evidence shows this road over which they were traveling was one with which they were not acquainted. They knew nothing of the existence of this railroad crossing 30 feet from the outlet of this 155 feet covered bridge. The question then is, wherein was the deceased negligent?

The evidence shows that the standard railroad notice of "railroad crossing, stop, look and listen," was nailed against the rafters at the entrance to the bridge. Defendant claims that failure to see this constituted negligence in the deceased. The place where this notice was placed was a most unusual one for notices of this kind, and the purposes for which it was intended. It is common knowledge that these notices are placed along the highway, attached to an upright post, where a person passing along can scarcely fail to see them. Here, as the Division Superintendent testified, the notice was "fastened on to the side of the bridge, where the rafters come through" (See N. of T. p. 47) and at a height, as the Section Foreman says, "It may be about eight or nine feet high, may be a little more * * * * Pretty close to the top of the bridge." (N. of T. p. 56). This notice, at a distance of 100 feet from the bridge—the incline being $6\frac{1}{2}$ feet in this 100 feet—was from 15 to 16 feet above the roadbed. This sign directly faced the occupants of the car only when they were making the right-angled turn where the road was hardly wide enough for two cars to pass, at a steep grade, to enter a $13\frac{1}{2}$ foot wide bridge, and when, naturally, the driver and the occupants of the car would have their attention riveted, not upon what might be tacked along the side, close to the top of the bridge, but to the opening, for the purpose of seeing whether a

car, from the opposite direction, was coming out, and thus avoid danger. This is what a careful driver would naturally, under the circumstances, do, and is what Mengel, the driver, said he did do. He testified, "I didn't see any sign; I just looked into the hole. * * * * Two machines would have trouble to pass, and you would have to be careful then. * * * I was watching the traffic." We then have this testimony:

"Q. What do you mean by that? A. There was nothing coming out before I had to shoot up.

"Q. Then you say you were on the lookout for anything that might be coming out of the bridge?. A. Yes, sir."
(N. of T. p. 11).

The other negligence that could be attributed would be failure to see the track whilst on the bridge or immediately at the outlet thereof. Defendant's Division Superintendent said he could see the rails from the bridge, but it is evident from his testimony that the reason he would see them was because of his occupation or employment as a railroader—he naturally would be on the lookout for matters of this kind in a way in which the ordinary person would not. He testified that right at the outlet of the bridge the railroad track could be seen north for a distance of about 400 feet. Mengel testified that it could be seen for about a distance of 50 feet, and that he first saw it when he came out of the opening about the length of his car, when he saw the engine through a circle of shrubbery up in that direction. We do not consider that under the circumstances as disclosed by the evidence, that the court could even say that the driver was guilty of contributory negligence, even if the position taken by the defendant that the negligence of the driver must be imputed to the passenger is correct. This position, however, we do not consider tenable.

The evidence is that Mengel at this time was running a taxicab business, or touring service, at No. 931 North Eighth Street, Reading, under the name of the Northeastern. That Adam Wanner, the deceased, had engaged him in the morning to take him and a party of friends to Virginsville, and that from there he was to receive further instructions from Wanner where to go. That whilst there was no price stated for the hire, Mengel was indebted to Mr. Wanner at the time for money borrowed, and the hire of this car was to square his account. He further testified on cross-examination that whilst they were to leave at one o'clock he did not know what time they were to come back, that they were to be governed by conditions, and that all he knew was he was going to Virginsville and from there he was to get instructions from Mr. Wanner as to where to go further. He said when he left Reading he had instructions as to what road they were to

take and from time to time Mr. Wanner would tell him what road to take; that from the instructions that were given to him the deceased practically did not know the road at all; that if he had told him to turn back to Reading before he came to Moselem, he would have done so.

From this and like evidence the defendant contends that this case does not fall under the rule that the negligence of the driver, if any, cannot be imputed to the passenger. The evidence disclosed nothing but the ordinary case of a conveyance for hire in every case of which the passenger gives the point of destination and may give directions as to the road to be taken. No other control is disclosed by the evidence in this case. The actual management of the car was in the hands of Mengel. Even in a case where the driver and the passenger are engaged in a common purpose, and have a common object in view, that of transacting business, in which both are interested, the driver's negligence is not to be imputed to the passenger, the latter, however, not being relieved from all responsibility: *Dunlap vs. Phila. R. T. Co.*, 248 Pa. 130, 133. The present case is very similar to *Hardie vs. Barrett*, 257 Pa. 42, where Hardie and his wife hired an automobile with its driver to convey them and two women guests from Sea Isle City, New Jersey, to a nearby yacht club. The rule governing this case is that as there stated on p. 46: "The rule is well established that when possible dangers, arising out of the negligent operation of a hired vehicle or a conveyance in which one is riding as an invited guest, are manifest to a passenger who has any adequate opportunity to control the situation, if he sits by without protest and permits himself to be driven on to his injury, this is negligence which will bar recovery. In other words, the negligence of the driver is not imputed to the passenger, but the latter is fixed with his own negligence when he joins the former in testing manifest dangers." Under the circumstances of this case we do not consider that the deceased, who was sitting in the front seat with the driver, had his face turned towards him, and his back toward the train, with his arm resting upon the back of the seat—and in this position occasionally conversing with those on the rear seat—was guilty of negligence by reason of this position thus maintained and the failure under these circumstances to see this dangerous crossing and give warning thereof to the driver so as to prevent the accident. Whether or not this was a manifest danger was for the jury. As we view this case the negligence of the defendant company and the contributory negligence of the deceased, if any, were questions to be determined by the jury and not by the court.

Rule for judgment n. o. v. is discharged.

YOUNGERMAN vs. CHRIST.

Landlord and Tenant—Recovery of Possession—Indeterminate Term—30-day Notice to Remove—Act 21 March, 1772, Sec. 12, 1 Sm. 373—Act 10 April, 1905, P. L. 135—Act 14 December, 1863, P. L. 1125.

In a landlord and tenant proceeding under Act 21 March, 1772, 1 Sm. 373, to recover possession of premises held by the tenant for an indeterminate term at a monthly rental, a 30-day notice to remove is sufficient. The Act 10 April, 1905, P. L. 135, providing for a 30-day notice applies not merely to Act 14 December, 1863, P. L. 1125, but also to the Act of 1772, when a proceeding is had thereunder to obtain possession from a tenant at will. Where the duration of the term is left uncertain the lessee holds ab initio as a tenant at will.

In the Court of Common Pleas of Berks County.

No. 15 May Term, 1917.

Certiorari.

John B. Stevens for defendant and certiorari.

C. H. Ruhl for plaintiff.

Opinion by Wagner, J., August 2, 1917.—This is a certiorari to a proceeding brought by a landlord against his tenant to recover possession under the Act of 21 March, 1772, Sec. 12, 1 Sm. 373 and Act of 10 April, 1905, P. L. 135. The only question raised is that a thirty-day notice to remove instead of a three-months' notice was given. Plaintiff contends that the Act of 1905 which requires but a thirty-day notice is not applicable to the Act of 1772. The Act of 1772 provides that "Where any person or persons in this province, having leased or demised any lands or tenements, to any person or persons, . . . at will, paying certain rents, and he . . . shall be desirous . . . to have again and repossess his . . . estate so demised," he shall proceed as provided for by said Act.

In this case the defendant in his complaint states that he demised to B. P. Youngerman for an indeterminate term at a monthly rental of thirty dollars the said premises. We have here a certain rent, thirty dollars a month, and an indeterminate time, therefore, an estate at will. In *Lyons vs. Railway Co.*, at p. 552, we have: "Where the duration of the term is left uncertain . . . the lessee holds ab initio as a tenant at will." The landlord here, therefore, clearly, to recover possession of his premises, had the right to proceed under this Act.

An examination of the record of these proceedings shows that the Act was strictly complied with in all particulars except that a thirty-day instead of a three-months' notice was given. Sec. 1 of the Act of 31 March, 1905, P. L. 87, provides: "In all cases where a tenant shall hold possession of real estate

within this Commonwealth whether oral or written for an indeterminate time; and the immediate landlord or owner of such real estate shall desire to regain possession thereof from such tenant he shall serve upon the tenant or an adult member of his family a notice, in writing, demanding therein that he requires such tenant or occupant to deliver to him the possession of the premises, so held, within thirty days from the date of service thereof." This Act, which provides for only a thirty-day notice, applies not merely, as contended for by the exceptant, to the Act of 14 December, 1863, P. L. 1125, but as well to the Act of 1772, when a proceeding is had thereunder to obtain possession from a tenant at will.

The exceptions are dismissed and the judgment of the alderman affirmed.

HART et al. vs. DICKINSON.

Attachments—Gate Receipts of Baseball Games—Players' Salaries.

L, the owner of the Reading Baseball Club of the Atlantic League, became indebted to B for the board of his players. B attached the gate receipts of a game, and recovered his claim therefrom. H and others, players of the club, sued the constable for damages, claiming that the gate receipts belonged to the players. The evidence showed that they were under contract with L, who leased the grounds, paid the rental and furnished the bats, uniforms and other paraphernalia. The players contended that on the day of the attachment they had decided that they would not play for L and that the gate receipts should belong to them. The jury found a verdict for the defendant. **Held:** that the players were employees of L and that their decision to appropriate the gate receipts was of no effect in the absence of evidence showing that their contracts with L entitled them to do so. Rule for new trial discharged.

In the Court of Common Pleas of Berks County.

No. 133 August Term, 1916.

Rule for new trial.

Walter S. Young for plaintiffs and rule.

Harry J. Dumn for defendant.

Opinion by Wagner, J., August 2, 1917.—Plaintiffs brought this suit against the defendant for damages upon this ground: The plaintiffs were the players of the Reading Club of the Atlantic League of Baseball Clubs. A. W. Lawson was the owner of the Club. On June 10, 1916, the defendant, a constable of the City of Reading, attached in the hands of George Butler \$100 at the instance of William Brunner, a hotel-keeper, on account of a board bill due by A. W. Lawson in the boarding by the said Brunner of certain players of the

Club. The \$100 attached was part of the gate receipts of the game played on June 10, 1916. The plaintiffs contended that the money thus attached and taken by the constable was their property and not that of A. W. Lawson.

Thomas Smith, one of the plaintiffs, testified that he was a member of the Reading Baseball Club. At the time this game was played they were under a written contract with Lawson. That Lawson had leased the grounds, paid the rental, was responsible for it, and that the baseball bats and uniforms belonged to Lawson.

Paul H. Davis, another plaintiff, testified that as far as he knew some of the uniforms were Lawsons, some of the bats and balls were furnished by Lawson, and that the contracts of the players with Lawson were typewritten ones.

Under this evidence the plaintiffs were under a written contract with A. W. Lawson as his employees, were playing upon the grounds leased by Lawson and made use of the uniforms, balls, bats, and of other baseball paraphernalia owned by Lawson at the time the game was played on June 10. Upon this state of facts the gate receipts, therefore, of that day belonged to Lawson. Plaintiffs contended that that day they got together and agreed among themselves that they would not play for Lawson, and that the gate receipts should belong to them. This agreement thus entered into between them was of value only as they showed circumstances and conditions under the written contract with Lawson which enabled them to so agree. Until this was done their contracts with Lawson as players bound them.

Counsel for plaintiffs was asked by the Court whether any effort had been made to get any of these written contracts for the purpose of showing whether under them they could thus release and by agreement among themselves appropriate the gate receipts. The answer was that no effort had been made and they had none of the written contracts to offer in evidence. Under these circumstances, therefore, any evidence attempting to show a breach of this contract by Lawson with the players, which would free them, was secondary evidence and not admissible. Neither were the by-laws and constitution of the Atlantic League of Baseball Clubs competent to be offered in evidence until the plaintiffs had first shown that the contracts that they had signed made the constitution and by-laws of the Atlantic League a part of the contracts which these plaintiffs had signed with A. W. Lawson. Under the evidence there was nothing for the Court to do but to direct a verdict for the defendant.

Rule for new trial discharged.

DULUTH SUPERIOR MILLING CO. vs. SHANEMAN.

Contracts—Contemporaneous Oral Agreement As Inducing Cause for Signing Written Instrument—Charge to Jury—Evidence.

Where the evidence of the oral contemporaneous agreement as the inducing cause for the signing of a written contract is clear, precise and indubitable, is not contradicted, and is such as would have convinced the Court sitting as a chancellor, a new trial will not be granted, though the Court in its charge to the jury omitted to instruct them that the evidence to prove the oral agreement must be "clear, precise and indubitable."

In the Court of Common Pleas of Berks County.

No. 94 December Term, 1915.

Rule for new trial.

Randolph Stauffer for plaintiff and rule.

Cyrus G. Derr for defendant.

Opinion by Wagner, J., August 2, 1917.—Plaintiff brought suit against the defendant for damages by reason of a breach of contract. It contends that on February 8, 1915, the defendant bought from it 410 barrels of flour, that he refused to take the same when requested by the plaintiff to give orders for shipment, and that there was then a breach of contract; that the plaintiff was damaged by the difference between the contract price and the market price at the time of the breach.

There was no denial by the defendant that he had signed the writing claimed by plaintiff to be a contract of purchase. What he claimed was that at the time he signed it he had a verbal contemporaneous agreement with the plaintiff that if a certain other carload of the same brand of flour which had previously been ordered but not yet received, did not prove satisfactory to his customers—he being engaged in the business of selling flour—that then the said writing should be of no effect as to the defendant; that the said carload did prove unsatisfactory, whereupon he so notified the plaintiff, and that thereupon he was no longer bound to take the flour, and that the setting up of this written instrument in violation of this verbal contract was a fraud upon the defendant.

It will be seen that this was not a case of an attempt to impeach a written contract by showing an oral contemporaneous agreement varying and contradicting it; but that it is an attempt to prove an oral agreement which was the inducing cause for the signing of the written instrument which plaintiff now attempts to use against defendant.

The evidence in this case abundantly proves that there was such a contemporaneous agreement as contended for on the part of the defendant and that it was that which induced the defendant to sign the written instrument now attempted to be used by the plaintiff as a contract of purchase. The de-

defendant testified that about February 8 two of plaintiff's salesmen came to his place of business, and that they wanted to sell him two more carloads of flour in addition to the one they had already sold to, but which had not yet been received by him. That he at first refused to sign an order for two cars because he did not yet know whether the first carload would prove satisfactory to his trade and so stated to these agents.

It was clearly shown by the evidence and not denied that this first carload of flour had been sold upon the express agreement written over the face of the order, by the agents, that it would be satisfactory to the defendant's trade. The agents still persisted in attempting to sell to him two other carloads and stated that if it did not suit his trade the mill would not want the flour to be in defendant's hands, and that if he found that the first car was not satisfactory they would take the other two carloads off of his hands. When they gave him this statement he then asked for the price, and signed the written instrument upon this guarantee or agreement that they would take it off his hands if the first car was not satisfactory. He further stated that the first car was not satisfactory and at once, upon ascertaining this, he gave notice thereof to plaintiff during the latter part of March or beginning of April that he would not take the second two carloads of flour. From the time of this notification, the evidence of which was not contradicted, he did not hear from the plaintiff until the following 16th day of June when plaintiff asked defendant for shipping orders.

The defendant is corroborated by his daughter, Minerva H. Shaneman, who testified that her father said to the agents: "I would consider myself foolish to buy two more carloads when I never tried the flour before. * * * I don't feel as if I ought to order two cars until I find out or see how the customers like it," to which the agents replied: "You won't be under any obligations at all to take the other cars if the first car doesn't prove satisfactory to your customers. We want your customers to be satisfied. We want to establish a trade here. It wouldn't do us any good to be selling you flour when you can't sell it. We want you to be able to sell the flour. * * * It must positively give satisfaction to your customers. If not, you are not under obligations at all to take the other two cars of flour." (N. of T., pp. 40, 41.)

George E. Eastburn and Samuel H. Moylan were the two agents who were alleged to have made this contemporaneous agreement with defendant. Eastburn, when called on the part of the defendant, said that when these two carloads were sold by them to the defendant, he (defendant) was told that if the flour was not satisfactory the mill would dispose of it. That prior to the time that defendant signed the contract he was given

the guarantee. He further stated that, as agent for the defendant company, he had authority from his superior officers or from the mill to bind his company.

The only witness called on the part of the plaintiff to contradict the evidence of these three witnesses, was Samuel H. Moylan, the other agent. His evidence, however, does not contradict that of defendant and his witnesses. When questioned whether such an agreement had been made with Mr. Shaneman; his answer was, "Not to my recollection." He at no time positively—although several times questioned by plaintiff's counsel—said that he did not enter into such an arrangement.

The evidence of the oral contemporaneous agreement as the inducing cause for the signing of the within instrument was clear, precise and indubitable, was not contradicted, and was such as would have convinced us had we been sitting as a chancellor. That the jury believed this testimony was shown by the verdict. It was clearly a case to be submitted to the jury: *Gandy vs. Weckerly*, 220 Pa. 285; *Faux vs. Fitler*, 223 Pa. 568; *Potter vs. Grimm*, 248 Pa. 440; *Diehl Mfg. Co. vs. Phila. Elec. Co.*, 49 Pa. Superior Ct. 257.

The plaintiff also contends that there should be a new trial granted upon the ground that the court omitted to state in the charge to the jury that the parol agreement must be shown by evidence that is clear, precise and indubitable.

There is scarcely any room for question but that the evidence in this case, and as we have detailed it, was clear, precise and indubitable. If, therefore, the jury found this evidence to be true, then clearly the verdict should have been for the defendant. In our charge we stated that if this written instrument was the entire contract and the breach was on June 18 as contended for by the plaintiff, then the plaintiff would be entitled to damages for the difference between the market value and the contract price of the flour at the time of this breach. But that if, from the evidence they found that this verbal agreement contended for had been entered into, that would be a complete defense to plaintiff's claim for damages. That is, that only as they found that this verbal agreement existed would then the defendant have a defense to plaintiff's claim. How they could have found from the evidence and attending circumstances other than that this agreement did exist, and that in pursuance of this agreement the order in the latter part of March or beginning of April had been countermanded, we fail to see. The very fact that shipping orders were not asked for by plaintiff until June 16, a month and a half after the goods, according to the written instrument, should have been taken by the defendant, indicates that the plaintiff company had received from defendant notice that he would not take the last two cars on account of the first one not being satisfactory to his trade.

The plaintiff submitted several points for charge by the Court. In these it did not request the Court to charge in the manner of which he now complains. In *Schwartz vs. Caplin*, 256 Pa. 239, at page 241, we have: "In any event, in a civil suit, where the Court's instructions are sound and cover every feature of the case advanced by counsel, an appellate Court will not ordinarily reverse for an omission to instruct the jury on some question to which the lower Court's attention was not in any manner directed at the trial." We do not consider that under the evidence submitted in this case, together with all the attendant circumstances, that this reason for a new trial contended for by plaintiff on account of the inadequacy of the charge can be sustained.

Rule for new trial discharged.

COMMONWEALTH vs. FREY.

Criminal Law—Bigamy—Common Law Marriage—Evidence—Question for Jury.

Defendant was convicted of bigamy, it being charged that he contracted a second marriage while his common law wife was still living. To prove the common law marriage, evidence was adduced to show that they had lived together for 20 years, were always known as Mr. and Mrs. Granville Frey, had joined church together, had their child baptized under the name of Frey, and were reputed to be man and wife in every community in which they lived. It was also shown that shortly after they started living together defendant obtained a divorce from his then wife, whereupon they changed their relations to that of man and wife, and thereafter defendant always called her his wife; that he told her it was not necessary to go to a minister; that before the birth of their child, she wanted to have a marriage ceremony performed, but defendant said it was not necessary and said "we are man and wife. I am your husband and you are my wife." She replied, "I am satisfied." On rule for new trial, **Held:** (1) that the evidence was sufficient to warrant the jury in finding that there had been a common law marriage; and (2), that the relationship and conduct of the parties and the birth of their child were sufficient to overcome the presumption arising from their former illicit relations.

Bigamy—Common Law Marriage—Evidence as to Invalidity of Marriage Incompetent—Act 27 March, 1903, P. L. 102, Sec. 1.

Under Sec. 1, Act 27 March, 1903, P. L. 102, a person can be convicted of bigamy whether the marriage be valid in law or not, if not legally annulled and void by the decree of a proper court of record. Evidence is therefore inadmissible and is properly rejected when offered to show that defendant's common law marriage was void for the reason that he had been divorced by his former wife on a libel charging adultery with the woman who became his common law wife, and that therefore they could not legally marry, his former wife being still alive.

In the Court of Quarter Sessions of Berks County.

No. 162 December Sessions, 1916.

Bigamy: Rule for new trial.

W. E. Sharman for defendant and rule.

William Jackson Young and Wilson S. Rothermel, District Attorney, for Commonwealth.

Opinion by Wagner, J., August 2, 1917.—The defendant, Granville F. Frey, in the bill of indictment, is charged with the crime of bigamy. The first section of the Act of 27 March, 1903, P. L. 102, provides:

"That the word 'husband' or 'wife,' for the purposes of this act, shall be construed to include any person who has gone through any form of marriage with any other person, which form is recognized as binding by the laws of the place where such form is used, whether the marriage be valid in law or not, if not legally declared annulled and void by the decree of a proper court of record."

The indictment charges that the defendant, having a wife living, had gone through a form of marriage recognized as binding with one Lydia A. Hauck. The defense was that Aravesta R. Frey, the person that the Commonwealth claimed to be the wife living when defendant went through the form of marriage with Lydia Hauck, was not his wife:

First, on the ground that there never was any form of marriage entered into between the two which is recognized as binding by the law of Pennsylvania; and,

Second, that even if there was such a form of contract entered into between the defendant and Aravesta Frey, the effect thereof was not a marriage, for the reason that he had, prior to this alleged marriage with her been divorced from a former wife upon the ground of adultery, wherein the co-respondent was Aravesta Frey.

The first question to be determined is whether any form of marriage was gone through by the defendant and Aravesta Frey, which form is recognized as binding by the law of Pennsylvania. The question is not whether the marriage is binding, but merely whether the form of the contract of marriage is such as is recognized as a binding one. The defendant and Aravesta Frey never went through a ceremonial marriage before a minister of the gospel or an officer of the law. What was contended for by the Commonwealth was that the form of marriage gone through by them consisted of an agreement between these two persons to be man and wife.

The evidence of Aravesta Frey is that she knew the defendant from childhood. Before she came to Reading she was living at a hotel in Allentown, and the defendant was boarding there. At this time the defendant was married to one whose name before marriage was Amelia Strauss. They both came to Reading together and resided on South Sixth Street. Afterwards they moved to Franklin Street; from

Franklin to Moss, and from Moss to Perkiomen Avenue, where the defendant was a licensed hotel-keeper. It was at about this time that Aravesta Frey contends that the formal agreement between them was made and when they changed their relations to that of man and wife, and she became known as such. About a year or so after they had come to Reading the defendant went to Allentown. Upon his return he informed her that he had obtained a divorce from his wife. After this he always called her his wife, said that she was his wife, that it would not be necessary to go to a minister, and that they were man and wife. Later, just before the birth of their daughter, Ruth, she said to him that she would be more satisfied to go to a minister and have a ceremony performed, whereupon he said it was not necessary to go to a minister. "He says: 'We are man and wife. I am your husband, and you are my wife.' " To this she replied, "I am satisfied." This occurrence happened before the birth of their daughter, who, on April 8, 1916, was 19 years old. After being a licensed hotel-keeper in Reading for two years, they moved to Chestnut Street where they kept a restaurant. Later they moved to a hotel at Lobachsville, Lehigh County, Pa., where they lived together as man and wife, she being known as Mrs. Granville Frey. Upon their return they moved to Springmont, then to Stony Creek, and afterwards to Spring Township. At all of these places they lived together as man and wife and were known as such, she going by the name of Mrs. Granville Frey.

Rev. J. Franklin Snyder testified that he was the pastor of the Lutheran Church at Mt. Penn. He knew the defendant and also Aravesta Frey, having first become acquainted with them in 1906. On Easter Day of that year they joined his church. After the defendant and Aravesta Frey had moved into his neighborhood he visited them, asked whether they were Lutherans, and upon receiving an affirmative answer, asked them whether it would not be possible to have them consider membership in his church. They consented to become members of the congregation, and he received from Mr. Frey their names. The usual ceremony of admitting members to the church was gone through, that is, the announcement of their names, Mr. and Mrs. Granville Frey, from the pulpit. Both were present when this was done. After they left that vicinity and church the request was made to him for a certificate, stating their membership. As he recalls this request, it was made by Mr. Frey. During Mr. Frey's membership he acted as treasurer for their congregation. During this period of time, from April, 1906, to January, 1910, the reputation in that community as to the relationship existing between them was as Mr. and Mrs. Frey, as man and wife. In that

way only were they known. He had never heard her spoken of in any other way than as defendant's wife. He stated that they regularly attended his church, and communed together when he had communion service.

Rev. E. S. Brownmiller testified that he knew the defendant and Aravesta Frey and had known them for quite a number of years. They joined Kissinger's Church, of which he was pastor. When they joined, Mr. Frey brought a certificate of membership from the prior congregation at Mt. Penn. He says that he read the certificate of transfer publicly in his church and announced that they, Mr. and Mrs. Granville Frey, were received as members of the church. They both partook of communion and attended church regularly. When asked what was their reputation at Kissinger's Church as to the relationship that existed between them, he answered, "Always understood in that way, nothing to the contrary, but that they were Mr. and Mrs. Granville Frey, * * * husband and wife." He never heard her spoken of by any other name. He performed the marriage ceremony between William H. Kunkelman and their daughter Ruth Frey, and among those present were Mr. and Mrs. Frey.

Rev. Henry W. Warmkessel stated that he was the pastor for some years at Lobachsville. He knew Granville Frey and Aravesta Frey. He knew them when Frey kept the hotel at Lobachsville in 1898. He was there on July 30, 1899, baptized their baby, and found there the parents Mr. and Mrs. Granville Frey. The record shows: "Granville F. Frey and wife, Aravesta; the name of the child, Ruth Rebecca; born April 8, 1898, baptized July 30, 1899, sponsors, the parents." In that community they were known as Mr. and Mrs. Frey. He said he never asked because they had a license "and it took man and wife to have it." He never asked the question whether they were man and wife, because he never dreamed of anything else.

William H. Kunkelman, the son-in-law, stated that he was married to the daughter Ruth. He was a member of Kissinger's Church, saw Granville and Aravesta Frey when they joined the church and heard the announcement from the pulpit. He called upon the daughter for a period of two years prior to their marriage. The reputation of Granville Frey and Aravesta Frey in Spring Township was that they were man and wife. He said that Aravesta Frey was known as Mrs. Frey and that when he went to procure his marriage license, because they were both under age, Mr. Frey and his father (Mr. Kunkelman) accompanied them.

Edward S. Wertz stated that he lived in Spring Township and knew Mr. Frey and his family. That different members of the two families visited one another, Mr. and Mrs. Frey

visited his family. He knew of them only as Mr. and Mrs. Frey, as man and wife. This relationship was never questioned in that community. They had their picnics together, turkey dinners and other social affairs. Mr. and Mrs. Frey would be there and known as husband and wife. He knew the daughter Ruth and knew her as the child of Mr. and Mrs. Granville Frey.

The daughter Ruth R. Kunkelman, testified that she was the wife of William Kunkelman. During the time the father and mother lived together the mother was always known in the community as Mrs. Frey. The father never said anything to any one that she was not his wife and that she never knew differently. She remembered when her parents joined the Kissinger Church. She was then 10 years old. She there went to Sunday School and her father was the superintendent of the school.

It was admitted defendant had entered into this second marriage contract with Lydia A. Hauck before Rev. Kershner.

None of this evidence was contradicted. There was, therefore, sufficient evidence to submit this first question to the jury. "Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state. Unequivocal and frequent admissions of marriage, accompanied by long-continued cohabitation and reputation, are frequently most satisfactory evidence of marriage:" *Richard vs. Brehm*, 73 Pa. 140, 144. If there was any illicit relation between these parties prior to the time when Aravesta Frey contended that they were married, the relationship and conduct of the parties and the birth of their child were sufficient to overcome the presumption arising from their former illicit relations: *Beegle's Estate*, 64 Pa. Superior Ct. 180, 188. This long-continued cohabitation and reputation we recognize does not constitute a marriage, but is merely evidence thereof. From the evidence there would seem to have been some agreement of marriage between these parties, even prior to the conversation that they had prior to the birth of their child. But, even if there was not that agreement, when he said, "We are man and wife, you are my wife," and when she said she would be better satisfied if there was a ceremonial marriage by a minister and then she after the conversation answered, "I am satisfied," under the circumstances under which those words were used, we consider that sufficient to constitute a binding contract between them to be man and wife. What they meant by those words in the light of the subsequent relationship, was for the jury: *Park vs. Kansas City So. Ry. Co.*, 58 Pa. Superior Ct., 419, 425. In our charge we stated: "If by those words it was mutually agreed between them that they would be man and wife without a ceremony, then that was a

contract between them to be man and wife, and constituted a marriage contract." We further said: "In support of that, that such was the case, and that that was the understanding and agreement between them, she shows their course of life, how they lived, and produced witnesses, ministers and others, to show that they were recognized in the neighborhood as man and wife, some saying they never heard of these two parties as being other than Mr. and Mrs. Granville Frey (Charge of the Court. p. 4)."

At the trial the defendant offered in evidence the libel in divorce of Amelia Frey, by her next friend Daniel Schlegel, against Granville F. Frey, No. 30 June Term, 1894, in the Court of Common Pleas of Northampton County, together with the subpoena awarded in the case, and the decree of court made on July 16, 1894. The purpose of this offer as stated by counsel was to show that Granville Frey was charged in the libel with having committed adultery with Aravesta Spoonheimer, said Aravesta Spoonheimer now claiming to be the common law wife of Granville Frey, to show that a divorce was granted on the ground of adultery, and that under the law of Pennsylvania, Granville Frey could not become legally married in any manner to the said Aravesta Spoonheimer during the lifetime of the said Amelia Frey, the said Amelia Frey being still living. This was objected to upon the ground that even if true it would furnish no defense under the Act of 1903 in a prosecution for bigamy. This objection was sustained and an exception granted to defendant.

Section 1 of the Act of 1903 provides that the words husband and wife shall include those persons who have gone through a form of marriage recognized by law, "whether the marriage be valid in law or not, if not legally declared annulled, and void by the decree of a proper court of record." It is not contended that this alleged marriage of Aravesta Frey and the defendant, even if illegal, had been declared null and void by the decree of a court of record. Therefore, the objection made to the offer of this evidence on the ground of its immateriality, was well-founded. The effect of the marriage form that they went into was immaterial under this Act of 1903.

Rule for new trial is discharged.

STROUT SHOE CO. vs. I. BEAR & CO.

Contracts—Time as of the Essence of the Contract—Waiver.

If time is made of the essence of a contract, it may be waived by the conduct of the purchaser; and if the time is once allowed to pass and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.

Same—Unauthorized Return of Merchandise—Delivery to Railroad Company.

Where a purchaser of goods has by his actions waived time as of the essence of the contract and accepts the goods, he cannot, on a suit for the price, defend on the ground that he returned the goods, unless he proves delivery to and receipt of the goods by plaintiff. Delivery to a railroad company is not sufficient.

In the Court of Common Pleas of Berks County.

No. 34 October Term, 1915.

Rule for new trial.

Harvey F. Heinly for defendant and rule.

Randolph Stauffer for plaintiff.

Opinion by Wagner, J., August 13, 1917.—Plaintiff brought suit against the defendant for the recovery of \$123.48, with interest from June 1, 1914, a balance alleged to be due to the plaintiff by defendant for shoes billed on March 13, April 29 and June 5, 1914. The defense was, first, that the shoes of March 13 and April 29 were not of the quality as the sample, were defective, and that by reason thereof plaintiff had agreed to allow a deduction of \$80.75; second, that the 28 pairs of shoes of June 5 were, on June 9, returned to plaintiff because they were delivered after the time on which they were contracted to be delivered.

Defendant's evidence was that the shoes of March 13 and April 29 had been contracted for in the preceding November to be delivered between February 15 and March 1. The shoes of March 13 were therefore shipped and received at least 13 days, and the shoes of April 29, two months after the time defendant testified they had been contracted for to be delivered. Therefore in the course of dealing between plaintiff and defendant there was a waiver by defendant of the time of shipment. Defendant testified that the goods billed on June 5 were received on June 8, but that these had been contracted for to be delivered about the middle of April. On April 29 plaintiff wrote to the defendant wherein they acknowledged receipt of defendant's letter of April 27, and stated that they were sorry that defendant's goods had been held up so long; that they were pleased to say they had shipped certain cases—evidently referring to the lot of April 29—which left a small amount of 28 pairs still due. These they wrote they would be able to ship in about a week. Defendant testified that the 28 pairs referred to in this letter were these goods ordered to be delivered about the middle of April. He further testified that after he received this letter he did not at any time prior to the receipt of the goods on June 8, cancel the order.

If time of delivery was of the essence of the contract, defendant's evidence clearly showed that he had waived it by his course of dealing by the acceptance of goods long after the time they had been contracted to be delivered and by the failure of defendant upon the receipt of the letter of April 29 to cancel the contract: *Price vs. Beach*, 20 Pa. Superior Ct. 291, 295; *Forsyth vs. North American Oil Co.*, 53 Pa. 168; *Webb & Co. vs. Nov. Hosiery Co.*, 231 Pa. 297. In *Fruit Co. vs. Roberts & Co.*, 8 Pa. Superior Ct. 500, at p. 506, we have: "The performance of a condition precedent may be waived by a party in whose favor it is stipulated, either expressly or by the implication resulting from his acts or conduct. 'But if time be made of the essence of the contract that may be waived by the conduct of the purchaser; and if the time is once allowed to pass and the parties go on negotiating for completion of the purchase then time is no longer of the essence of the contract.' *Webb vs. Hughes*, L. R. 10 Eq. 281; *Hipwell vs. Knight*, 1 Y. & C. 401. See also *McKay vs. McKenna*, 173 Pa. 582; *Pollock on Contracts*, *464." Also in *Robinson vs. Listonbury C. M. Co.*, 58 Pa. Superior Ct. 136, page 141, it is stated: "Where a party discovers facts which warrant rescission of his contract, it is his duty to act promptly, and in case he elects to rescind to notify the other party without delay. What is a reasonable time or undue delay when the facts are undisputed, is a question of law to be determined by the court: *Zeller vs. Haupt*, 41 Pa. Superior Ct. 647."

It was, therefore, too late on June 8 for the defendant to rescind the contract on the ground of delay in shipment, which was the sole ground advanced for the alleged return of the shoes on June 8. The evidence shows that these 28 pairs were the only shoes contracted for that had not yet been delivered. The defendant accepted the goods from the railroad company and unpacked the shoes. After by this action having accepted the goods, they repacked them, and as defendant claimed, returned them to the plaintiff by delivering the 28 pairs of shoes to the railroad company. There was no evidence whatever that the plaintiff had received these goods. Also, if defendant desired to rescind the contract upon the ground of failure by plaintiff of the time of delivery, there was no necessity for him to receive same from the railroad company. There was, therefore, not that return by defendant which warranted his receiving any credit for goods returned and received. Under the evidence in this case this offset of \$70 was not supported by the evidence and could not be allowed.

The offset of \$55.75 claimed by defendant,—that is, \$80.75 less \$25 already allowed by plaintiff,—was for shoes of the lots of March 13 and April 29, said to be defective. Allowing

this set-off in full against plaintiff's claim of \$123.48, leaves a balance due of \$67.73. The verdict for plaintiff was for \$64.63. Defendant cannot complain of this verdict since it is evident, as we view this case, that the jury allowed more for defectiveness of goods than the defendant claimed.

Rule for new trial discharged.

SOUTH MOUNTAIN LAND CO. vs. P. & R. COAL & IRON CO.

Contracts—Mining Iron Ore on Royalty—Implied Contract to Mine With Diligence—Minimum Royalty as Penalty or Liquidated Damages.

Where the right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income contemplated when the agreement was entered into, and a consequent liability for damages for non-performance; where, however, the parties expressly agree for a minimum annual output and payment, and the contract itself shows that in the intention of the parties the minimum royalty was to be considered as liquidated damages and not as a penalty, the rule does not prevail, and a failure to mine the ore is no basis for a claim for damages beyond the minimum royalty agreed upon.

In the Court of Common Pleas of Berks County.

No. 30 March Term, 1917.

Rue for judgment for want of sufficient affidavit of defence.

C. H. Ruhl and J. M. Rhey for plaintiff and rule.

Snyder, Zieber & Snyder for defendant.

Opinion by Endlich, P. J., August 25, 1917.—The declaration and affidavit of defence filed in this case recite a good many details which it is not necessary to rehearse. Its material facts and the determining principles applicable to them seem few and obvious enough.

Plaintiff is the successor in title to a tract of land in Cumberland, Adams and York counties, upon which there is a deposit of iron ore. In 1872 the then owners made a contract with defendant, (subject to which plaintiff acquired the ownership), whereby, for a term of 99 years, the defendant was given the right, together with extensive powers of control over the premises, to mine the ore in the tract upon certain conditions, including the taking away of at least 50,000 tons of ore annually at 50 cents per ton, and in any event the payment of a minimum royalty, rental or price amounting to the

sum of \$25,000 each year. Later, in 1878, the price per ton was reduced to 40 and 10 cents, and the minimum to be paid for by defendant to such quantity as at the price stated would, if mined, yield \$2,000 per year, the payment of this sum in any year being made applicable to royalties, etc., for ore mined accruing subsequently. The reason for this change is not apparent. Possibly, (though it is not so averred in the affidavit of defence and hence cannot be assumed: *Kaufman vs. Iron Co.*, 105 Pa. 537, 542,) it was dictated by disappointment of expectations as to the extent or quality of the deposit of ore or the facilities for getting it out. The contract contains no requirement of diligence or continuous operation on the part of the defendant, and in terms provides for no forfeiture on failure to operate. For some years the defendant carried on operations on the land, but since then has failed and **refused** to do so or to **surrender** the contract. The principal claim in this action is based upon the theory that there is implied in the contract a covenant to mine with diligence, a breach of that implied covenant, and a consequent right in the plaintiff to recover damages on account thereof to the amount of \$360,000. The defendant's answer is that all that can be exacted from it is the minimum annual payment stipulated for in the contract as modified, and that by virtue of certain transactions set forth in the affidavit of defence that amount has been practically paid, indeed overpaid, in advance, and that there is nothing due by defendant to plaintiff at this time. It is conceded that if the provision for a minimum payment overrides the liability arising from the implied covenant referred to, the defendant's position is impregnable.

Where the right to mine ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income contemplated when the agreement was entered into, and a consequent liability for damages for non-performance: see *Watson vs. O'Hern*, 6 W. 362; *Lyon vs. Miller*, 24 Pa. 392; *Koch's App.*, 93 id. 434; *Aye vs. Philadelphia Co.*, 193 id. 451; *Chauvenet vs. Person*, 217 id. 464; *Genet vs. D. & H. Canal Co.*, (N. Y.), 19 L. R. A. 130; *Grass vs. Big Creek, etc., Co.*, (W. Va.) 84 S. E. Rep. 750. But, as laid down in *Aye vs. Philadelphia Co.* *supra*, at p. 456, "the rule in regard to contracts is that where the parties have expressly agreed on what shall be done there is no room for the implication of anything not so stipulated for;" and the question here is whether the provision for the minimum annual output and payment is such an express agreement as displaces the implied liability under the principle just stated. It would seem to be

the position of both parties that the answer to that question hinges upon whether the minimum payment is to be regarded as a penalty or as liquidated damages; and it is certain that this inquiry in turn depends upon the intention of the parties, to be gathered from the agreement itself with the aid of such light as can be derived from the circumstances connected with it: *Emery vs. Boyle*, 200 Pa. 249. As relating to mining contracts, the controlling considerations appear to indicate that such a provision for a minimum is ordinarily to be regarded as designed to provide for liquidated damages and not for a penalty: see *Powell vs. Burroughs*, 54 Pa. 329; *Lehigh Coal Co. vs. Wright*, 177 id. 387. Liquidated damages for what? Evidently for the non-performance of some part or parts of the contract for which damages would be recoverable,—e. g., for the non-production of what would otherwise be required to be produced: that is to say, as pertinent to this case, for the failure to mine diligently and continuously,—and in lieu of what might be recoverable by way of damages therefor. So the stipulation for a minimum seems to have been understood in *Powell vs. Burroughs*, supra, at p. 336, and as there pointed out, if the parties have agreed on the damages thus recoverable, nothing more can be recovered. *Expressum facit cessare tacitum*. Plainly to the same effect is the reasoning in *Genet vs. D. & H. Canal Co.*, supra—a decision approvingly cited in *Chauvenet vs. Person*, 217 Pa. 464, 475. If, indeed, the party in default can be shown to have wrongfully incapacitated himself from performing his undertaking, or to have wilfully mismanaged the property so as to make it incapable of yielding what it ought, damages can be demanded for such wrongful conduct: *Genet vs. D. & H. Canal Co.*, supra. And, as decided in *Chauvenet vs. Person*, supra, if the contract expressly calls for diligent and continuous operation, of course, the stipulation for a minimum annual payment will not necessarily relieve from full liability upon the former provision. Neither of these last mentioned features is present in this case. The only thing that would seem to raise any difficulty about it is the 99-year term. If the contract were for one year or for 10, there could hardly be any hesitation. But in view of the long term, it may be suggested (see *Chauvenet vs. Person*, supra, at pp. 474-5,) that to restrict the plaintiff to a recovery of the minimum annual payment would enable the defendant to hold on to the mining contract without doing any mining, for the mere purpose of speculation or of keeping the property out of the market or preventing its falling into the hands of a rival; which might be inequitable and presumably contrary to the intention of the parties as evidenced by the contract itself. The answer, however, seems to be that the improvidence of a contract or the hardship or inconvenience resulting

from it is no ground for relief against its express and deliberate provisions so long as they are lawful: *Nace vs. Boyer*, 30 Pa. 99; *Singer's Est.*, 217 id, 295; *Bersch vs. Rust*, 249 id. 512. On the same ground, the change made in the minimum is not a decisive element. Whatever the reasons for it were, they must be accepted as having been satisfactory to the parties, and courts will not understand the interests of contracting parties better than they themselves did: *Phillips vs. Blatchford*, 137 Mass. 150. At \$25,000 per year there could hardly be room for believing the minimum to have been inadequate even for a 99-year term. If this term did not in the opinion of the parties stand in the way of a reduction of the minimum to \$2,000, there is no occasion for the Court so to pronounce it. Had the parties regarded it in that light, it would have been easy to meet the difficulty by an appropriate modification. In this connection it may be observed that to hold the liability imposed by the minimum provision to be the only enforceable one under this contract by way of damages, does not perhaps necessarily exclude every other remedy as available to plaintiff. The question here is simply one of liability to one measure of damages or another, not one of the termination of the contract by abandonment or forfeiture through non-performance of an impliedly assumed duty. Upon that question no opinion is required or meant to be expressed.

Assuming, but not deciding, that with respect to the claim discussed the case is within the requirements of the affidavit of defence law,—if the view indicated is correct, it is clear that there can be no judgment for that claim for insufficiency of the affidavit, and it is therefore needless to advert to the other items of plaintiff's demand, except to note that the present rule is for a judgment for the entire demand, not for a part of it (see Rules of Court, 16), and that the affidavit of defence directly meets those items.

The rule to show cause is discharged.

MEINIG vs. INTERNATIONAL MONEY MACHINE CO. et al.

Contracts—Purchase of Shares of Stock—Misrepresentations—Rescission—Notice and Tender—Equity.

Plaintiff filed a bill in equity to annul a contract to purchase 5,000 shares of stock from defendants for cash and securities, alleging misrepresentations on the part of the president of the company. Defendants contended that the plaintiff was not entitled to a decree because he had failed, before instituting the suit, to give notice of his rescission of the transaction and to offer a return or make a tender of the stock certificates. **Held:** that under the circumstances of the case the plaintiff was not precluded from maintaining his bill by reason of want of notice of rescission or tender.

While, in actions of law, the rule is that notice and tender are ordinarily necessary to sustain a proceeding, unless the subject matter thereof is utterly worthless, yet in equity the rule does not attain with the same rigor as at law, because a decree can nearly always be framed in such manner as to insure justice. In so far as rescission and notice thereof are concerned, the institution of the suit and service of process may themselves be treated as amounting to such.

Same—Equity Jurisdiction—Remedy at Law—Adequacy of Remedy.

While a person who has purchased shares of stock upon misrepresentations may have a remedy at law, nevertheless he has no adequate remedy except in equity, in order to be relieved from the relation and liability as a stockholder.

Stock Purchases—Misrepresentations—Injury to Purchaser.

Where a person is induced to buy stock in a corporation on representations that all but a small portion of the price paid would go into the treasury of the corporation and be used for its purposes, and it subsequently appears that 45% of the purchase price was diverted from the treasury to the company's fiscal agent, a financial detriment to the plaintiff as a stockholder of the company results.

Corporations—Sales of Capital Stock—Fraud by President—Responsibility of Corporation.

A corporation is responsible for a fraud practised by its president in a sale of stock, in the sense that it cannot be permitted to retain the benefits of the transaction.

In the Court of Common Pleas of Berks County: In Equity.

No. 1182 Equity Docket, 1916.

Bill to rescind contract to buy stock.

C. H. Ruhl and Rothermel & Mauger for plaintiff.

John B. Stevens and W. B. Bechtel for defendants.

Opinion by Endlich, P. J., August 25, 1917.

I. FINDINGS OF FACT.

1.—The International Money Machine Co., defendant in this bill, is a corporation organized and existing under the laws of the State of Indiana for the manufacture and sale of office devices, including adding machines, money counting machines, etc., and Edward C. Baker, the remaining defendant, in the summer of 1916 was and presently is the president of said corporation.

2.—In the summer of 1916 the defendant company, intending to remove its plant to the city of Reading, offered for sale to the citizens of said city a large number of shares of its capital stock, the par value of which is \$10 per share.

3.—In July, 1916, the defendant Baker, in company with a sales agent, called upon the plaintiff for the purpose of inducing him to purchase shares of said capital stock, which had been offered to him at the price of \$11.50 per share. Upon plaintiff's inquiry as to the disposition of the proceeds of the stock,

said Baker made a reply which was calculated to be understood by Meinig, and was by him understood, as meaning that for every share of stock sold the company received into its treasury and had the use and benefit of at least \$10.

4.—In reliance upon this representation made to him as aforesaid by Baker, the plaintiff purchased 5,000 shares of the defendant company's stock at \$11.50 per share, paying therefor by \$100 in cash, the transfer of securities of the par value of \$30,000, and a negotiable note payable on demand after the first of November, 1916, for \$28,865.

5.—At the time when this transaction took place and Baker made the representations above stated, he, Baker, knew them to be untrue and false in this, that the company, under subsisting contract with its fiscal agent, was under obligation to pay to him and was paying to him commissions of 40 per cent. and 45 per cent. upon the sale price of all stock sold, depending upon the volume of the monthly sales, so that at the price at which the plaintiff purchased the company would not realize more than between six and seven dollars per share.

6.—When, in October, 1916, the plaintiff learned the facts detailed in the foregoing finding, he promptly filed his bill, praying to have the sale and purchase of the stock aforesaid and the entire transaction declared null and void on the ground of fraud, to enjoin the negotiation of the \$28,865 note, and to compel restoration of the securities transferred, as well as to direct a return by the plaintiff to the defendants of his certificates of stock.

7.—Apart from the institution of this suit and the prayers of the bill, the plaintiff at no time gave any notice to the defendants of his rescission of the transaction, nor made any formal offer or tender of a return of the stock held by him, but still retains the same in his possession.

II. DISCUSSION.

The object of this bill in equity is to annul a transaction whereby the plaintiff became purchaser of 5,000 shares of the Money Machine Co.'s stock and parted with cash and securities in payment. The ground alleged for its annulment is misrepresentations on the part of the president of the company, the defendant Baker, concerning the amount of the sum paid for the stock that was to go into the treasury and for the use and benefit of the company. The fact that the representations substantially as stated in the foregoing findings were made by Baker is so conclusively established by testimony adduced by the plaintiff, and supported by Baker's own admission, that there is hardly any room for fair dispute about it. The plain-

tiff's testimony is that, when he inquired as to the disposition of the surplus of the price of the stock above its par value, he was told by Baker that as much of it as was necessary would go to advertising and commissions and other expenses for selling and promoting the stock, but that there would be more than \$10 left for the company. Mr. Fencil, the sales agent, present at the interview, corroborates this testimony almost verbatim, the only difference being that he says that Baker stated that the company would receive "at least" \$10 per share for its stock; and he further testifies that he at the time was ignorant of the contract for 40 and 45 per cent. commission—a fact which also appears by one of the letters of the defendant Baker. The latter himself, in answer to the question, "I understood you to say that you did say that for every share sold there was a credit of \$10 on the books?" replied, "To treasury stock, that being the par value of the stock." The witness Brizzolari deposed that Baker, after returning from the interview, said, "Well, I did it, I made the sale;" that the witness asked Baker, "How did you get by on the commission? Didn't Mr. Meinig want to pin you down on commission?" to which Baker replied, "Yes, I kept away from that by telling him that it was a little better than \$10 going in the treasury of the company;" that the witness then said, "Well, that's all right if you made it,"—whereupon Baker remarked, "Well, you have got to tell a lie now and then to these Dutch here in Reading to get them started." There are other portions of the testimony which bear upon this matter, but it is unnecessary to recite them. Equally well settled by the testimony is the fact of the falsity of those representations as calculated to be understood by the plaintiff and as in truth understood by him. Nor is there any doubt about Baker's knowledge of their falsity, or about plaintiff's reliance upon them, or about their having operated as an inducement to his purchase of the stock, nor that, if they had not been made and relied upon by the plaintiff, or if he had known their falsity, he would have abstained from making the investment. Indeed, the defence that is made here does not appear to question these facts. It is based upon the plaintiff's failure before the institution of the suit to give notice to the defendants of the rescission of the transaction and to offer a return or make a tender of the stock certificates issued to him.

Undoubtedly, concerning actions at law, the rule is that such notice and offer or tender are ordinarily necessary to sustain the proceeding, unless the subject matter thereof is utterly worthless: *Pearsoll vs. Chapin*, 44 Pa. 9; *Beetem's Admrs. vs. Burkholder*, 69 id. 249; *Morrow vs. Rees*, *ibid.* 368; *Leaming vs. Wise*, 73 id. 173; *Sloane vs. Shiffer*, 156 id. 59; *Schofield vs. Shiffer*, *ibid.* 65; *McElwee vs. Chandler*, 198 id. 575; *Rumsey vs. Shaw*, 212 id. 576; *Acetylene Co. vs. Smith*, 10 Pa.

Super. Ct. 61,—and many other cases. The principle has been applied in equity cases: see, e. g., *Lyle vs. Shay*, 165 Pa. 637, and *Schneider vs. Foote*, 27 Fed. 581. But in equity it does not obtain with the same rigor as at law, because in equity the decree can nearly always be framed in such manner as to insure justice. Accordingly it is laid down in *Babcock vs. Case*, 61 Pa. 427, and reaffirmed in *Burns vs. McCabe*, 72 id. 309, that if equity requires a return to precede the suit it will be so administered; if it can be protected on the trial, as it may in almost every possible instance, it will be so administered. If, for example, it appeared here that after the institution of this action the value of the stock had undergone material changes, it might have to be held that a notice of rescission and offer of restoration before suit was necessary. In the absence of such circumstances, the case is different. And so far as rescission and notice thereof are concerned, the institution of the suit and service of process may themselves be treated as amounting to such: see *Howard vs. Turner*, 155 Pa. 349; *Lightcap vs. Nicola*, 34 Pa. Super. Ct. 189; 2 Black, *Rescission and Cancellation*, sec. 576. The doctrine stated seems to accord with that approved in *Thomas vs. Beals*, 154 Mass. 51, 27 N. E. 1004, and *Parker vs. Simpson*, 180 Mass. 554, 62 N. E. 401. In the former decision it is said,—

“There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not, like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse obtained by a fraudulent exchange, and to which the plaintiff has no right, unless he has restored what he has received. The foundation of this bill is that the rescission is not complete, and it asks the aid of this Court to make it so. It is objected that, at least, the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the Court has power to impose equitable conditions upon the relief granted the plaintiff,—and in *Parker vs. Simpson*, *supra*, referring to that case, it is added that “by the filing of the bill and the service he (the defendant) has sufficient notice.” To the same effect appear to be *Harding vs. Olson*, 177 Ill. 298, 52 N. E. 482, and *Allerton vs. Allerton*, 50 N. Y. 670. Nothing has been pointed out in the circumstances of this case demanding, for the purposes of accomplishing equity, that a return of the stock should have been made or offered before the institution of the suit, or rendering it impossible to do justice by the decree to be entered. The prayer of the bill for direction to return the stock is a virtual offer to do so, and it would seem that the defence must, under the principles stated, be deemed unavailing.

No doubt the plaintiff would have a remedy at law. But he has no adequate remedy except in equity in order to be relieved from the relation and liability as stockholder. A suit at law for damages would necessarily be in affirmance of the transaction, and it is from the effect of this that he is seeking to escape: see *Bosley vs. National Machine Co.*, 123 N. Y. 550, 25 N. E. 990.

Neither can there be any question about the injury suffered by the plaintiff. According to the representations made to him, all but a small portion of the price paid for the stock was destined to go into the treasury of the company and to be used for its purposes. It now appears that 45 per cent. of it was diverted from the treasury into the pockets of the fiscal agent, and it goes without saying that that involves a financial detriment to the plaintiff as a stockholder in the company. It has, however, been decided (see 1 Cook, Corporations, (7th Ed.) sec. 156), and is obvious on common sense grounds that "a person induced by fraud to subscribe for stock may have the subscription cancelled, even though he does not show that he has been damaged."

That for a fraud practiced by the company's president upon the plaintiff the company is responsible in the sense that it cannot be permitted to retain the benefits of it, requires no elucidation (see 1 Cook, Corporations, sec. 140).

There can hardly be any pretence of a ratification of his contract by the plaintiff by reason of his visit to the company's plant in Indiana and a telegram sent by another of the party to Reading declaring conditions "quite satisfactory." It appears that the plaintiff knew nothing of this telegram until after it had been sent, and then expressed disapproval of it.

III. CONCLUSIONS.

A—The failure of the plaintiff before instituting this action to notify the defendants of his rescission of the transaction here in question, and to offer or tender a return of the stock certificates issued to him, does not, under the circumstances of this case, preclude the plaintiff from maintaining his bill or disentitle him to a decree.

B—The plaintiff has no adequate remedy at law.

C—In so far as financial injury to the plaintiff may be an element in his case, there is sufficient proof of such to enable the plaintiff to maintain his bill.

D—For misrepresentations made by the company's president to the plaintiff, inducing him to subscribe to the stock of the company, the latter is responsible in the sense that it cannot be permitted to retain the benefit of the transaction.

E—There was nothing capable of being treated as a ratification of the transaction by the plaintiff after he had obtained knowledge of the falsity of the representations made to him and operating as the inducement for his subscription to the stock of the company.

F—The misrepresentations made to the plaintiff by the president of the company and inducing the plaintiff to subscribe for its stock constituted such a fraud upon him as entitles him to be relieved from his contract and to have the transaction annulled and set aside.

G—The plaintiff is entitled to a decree directing a return by him of the stock certificates to the defendants, and on their part a return to him of the securities transferred in the transaction, or the proceeds thereof if disposed of by the defendants, repayment of the cash paid by him, and restoration to him of the promissory note given by him to the company,—the injunction against the negotiation of said note to be in the meanwhile continued.

H—The costs of this litigation are to be paid by the defendants.

And now, Aug. 25, 1917, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

O'REILLY et al. vs. READING TRUST CO., Trustee, Etc.

Evidence—Competency of Witness—Act 23 May 1887, P. L. 159, sec. 5.

1. In an action in equity to set aside a trust agreement executed between a father and his daughters with relation to property, the father's right to which ended at his death and did not pass to any party on the record representing his interest, the daughters are not prohibited by the provisions of the Act 23 May 1887, P. L. 159, sec. 5, from testifying, after the father's death, as to how they were led by him to execute the agreement.

2. Guardian and Ward—Relationship.

Where a guardian is appointed by the Orphans' Court on a petition preferred by the ward at the instance and direction of her father, the act of the guardian in executing an agreement between the ward and her father is to all intents and purposes to be considered as the act of the ward.

In the Court of Common Pleas of Berks County; in Equity.

No. 1176 Equity Docket, 1916.

Exceptions to Decision reported in 9 Berks Co. L. J. 110.

Isaac Hiester for defendant and exceptions.

E. H. Deysher for plaintiff.

Opinion by Endlich, P. J., August 25, 1917.—1. The first three exceptions filed by the defendants to the decision in this case relate to the competency of the daughters of John F. O'Reilly as witnesses at the trial. The contention that they are not competent witnesses is, of course, based upon clause (e), sec. 5, Act 23 May 1887, P. L. 159, which forbids a surviving party to a thing in action to testify adversely to the interest of a deceased one where the latter's right has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy. It is insisted that, as regards the Patrick O'Reilly trust fund, the agreement of 1897 dealt with John F. O'Reilly's interest in his father's estate and, subject to his life-interest therein, by his own act passed the same to the trust company for the benefit of the parties described in the deed, and that interest is now vested in the trust company; that his life-interest only expired with his life; but that the other interest is represented by the trust company, a party on the record; that the share of John F. O'Reilly in his father's estate is the first subject-matter in controversy; and that the trust company claims to own it for his grandchildren under the agreement whose validity plaintiffs deny. It is further insisted that the second subject in controversy is the plaintiffs' share of the Catharine Cecelia O'Reilly estate; that this share was undoubtedly the property of the plaintiffs, subject to the life-estate of John F. O'Reilly and Mary E. O'Reilly; but that John F. O'Reilly purchased the remainder interests for the use of his grandchildren, and the plaintiffs are denying the validity of this instrument; that here too John F. O'Reilly's life interest has expired, but the interest he purchased (vested in the trust company for his grandchildren) is the subject in controversy. Thus, in both aspects, it is argued, a party to the thing in action is dead; his interest has passed to the trust company; plaintiffs deny this, and offer to testify, in effect, that it has not so passed; their interests are therefore adverse to the rights of the deceased, and they are disqualified to testify to matters occurring in his lifetime which would make nugatory his deed: see *Rudolph vs. Rudolph*, 207 Pa. 339, 344.

There seems, however, to be an adequate answer to this contention. The right of the plaintiffs to set aside the Catharine Cecelia O'Reilly trust is conceded by defendants. It needs no testimony for that purpose. It is therefore unnecessary to discuss any question that might arise in relation to it if it were in controversy. It can have no effect upon the competency of these parties with reference to the Patrick

O'Reilly fund. Undoubtedly John F. O'Reilly's original interest in the latter forms part of the subject matter here in dispute. But the agreement of 1897 does not constitute the act of John F. O'Reilly by which it passed to the trust company. He assigned his interest to Catharine Cecelia O'Reilly in 1889, and it was by virtue of her testamentary disposition of it that it came into the hands of the trust company as successor to the trustee to whom she had given it. All John F. O'Reilly had in 1897 was his life estate in that fund, and that expired when he died. The trust company represents no subsisting interest of John F. O'Reilly or his estate in this litigation, and his daughters were testifying adversely to none such. The assignment in 1889 of John F. O'Reilly's interest in his father's estate to Catharine Cecelia O'Reilly was not disturbed by the agreement of 1897, and to that assignment the daughters were not parties.

2. The 4th and 5th exceptions draw in question the findings that the daughters of John F. O'Reilly stood in a confidential relation to their father, and in executing the agreements here attacked acted under his domination and direction and in ignorance of their rights. The only one of the daughters concerning whom this contention requires any further notice is Joanna, for whom the Orphans' Court appointed a guardian and for whom that guardian formally acted. It is a clear fact, however, that this appointment was made upon the petition of Joanna, and that that petition was preferred by her at the instance and direction of her father. To all intents and purposes what the guardian did was her act. Moreover, it is not perceived how, if the transaction is to be avoided as to two of the daughters and the widow, it can be maintained as to the remaining daughter.

3. The exceptions (6th and 7th) to the conclusions necessarily fall with the exceptions to the competency of the daughters as witnesses and to the findings of fact already referred to.

At the argument of this case, some criticism was suggested of the decision excepted to for the reason that the "Conclusions" consist simply of declarations of the decree the plaintiffs are entitled to upon the basis of the facts found without further or formally stating the legal grounds of their right considered in the "Discussion." Whilst none of the exceptions filed raise any objection of this kind, and perhaps could not successfully do so, it may be more satisfactory to indicate briefly, by way of additional conclusions, what will serve to lead up to the final conclusion as to the decree to be entered. With that end in view, the conclusions are to be amended so as to read as follows:—

III. CONCLUSIONS.

A—There is sufficient competent evidence in this case to sustain the material allegations of plaintiffs' bill and establish the essential facts averred therein.

B—The facts proven by the evidence make out the existence of a confidential relation between John F. O'Reilly and his daughters—the exercise by him over them of that domination which said relation enabled him to exercise—an unquestioning obedience on their part to his desires—and their execution of or assent to the agreement of Dec. 3, 1897, without inquiry into or realization of its effect and consequences upon their rights and interests, in deference to his authority and dictation, and in reliance upon his judgment.

C—There was no consideration moving from John F. O'Reilly to his daughters for their joinder in the agreement of 1897. The so-called compromise effected by it was simply an arrangement imposed by him upon his daughters, and acquiesced in by them without choice of their own. The agreement secured no advantage to them, but has turned out burdensome and inconvenient to the daughters and unnecessary for the purposes of the widow, who now joins with them in the effort to have it set aside.

D—The situation as regards the youngest daughter Joanna is virtually the same as that regarding the older daughters, her petition to the Orphans' Court, which underlay the appointment of a guardian for her and his joinder in the agreement of 1897 in her behalf, having been preferred by her at the instance and direction of her father.

E—An avoidance of the agreement of 1897 with respect to the older daughters and the widow involves its avoidance as to the remaining youngest daughter, Joanna.

F—The right of the plaintiffs to proceed for the avoidance of the agreements of Dec. 3, 1897, and of May 3, 1901, is not, under the circumstances of this case and in view of the relation of the parties and the ignorance of the daughters of material facts concerning the funds involved, barred by laches on their part in not proceeding sooner for that purpose.

G—The right of the plaintiffs to avoid the agreement of 1901 being admitted on all hands is to be treated as beyond dispute.

H—The plaintiffs are entitled to a decree—

(a) declaring null and void the agreement dated Dec. 3, 1897, entered into between John F. O'Reilly and Mary E. O'Reilly on the one part and Catharine O'Reilly Kelly, Elizabeth D. O'Reilly, now Elizabeth O'Reilly Mishler, and James Nolan, guardian of Joanna M. O'Reilly, on the other part;

(b) declaring null and void the agreement dated May 3, 1901, executed by Catharine O'Reilly Kelly, Elizabeth O'Reilly Mishler and Joanna M. O'Reilly;

(c) decreeing the Reading Trust Company, trustee, to hold the trust fund amounting to the sum of \$38,057.30 arising out of the estate of Patrick O'Reilly, deceased, for the benefit of Mary E. O'Reilly for life, and after her death the principal thereof to be paid to Catharine O'Reilly Kelly, Elizabeth O'Reilly Mishler and Joanna M. O'Reilly, the child or children of either of them, in the event of death, to represent the parent;

(d) decreeing the Reading Trust Company, trustee, to hold the trust fund amounting to the sum of \$65,270.69 arising out of the individual estate of Catharine Cecelia O'Reilly, in trust to account for and pay over the same to Catharine O'Reilly Kelly, Elizabeth O'Reilly Mishler and Joanna M. O'Reilly, less its reasonable costs, expenditures and commissions.

I—The Reading Trust Company, trustee, is to pay the costs of this suit out of the funds in its hands.

And now, Aug. 25, 1917, it is ordered that the conclusions stated in the decision heretofore rendered in this case be amended to read as above set forth, and that thereupon the exceptions filed to said decision be dismissed.

BINGAMAN vs. POOR DIRECTORS.

Poor Directors—Failure to Defend Suit—Petition of Taxpayer to Intervene as Party Defendant—Insufficiency of Suggested Defense.

The petition of a taxpayer to intervene as party defendant in a suit against poor directors will not be granted where the proposed defense to the suit, as given in his petition to intervene, would be insufficient to prevent judgment for the plaintiff.

Taxpayers—Right to Intervene in Suits.

To entitle a taxpayer to intervene in a suit against poor directors he must set forth in his petition that which affects the merits of the claim. The mere fact that the poor directors do not propose to contest the claim is not sufficient ground upon which to base intervention by a taxpayer.

Poor Directors—Suit for Physicians' Salary—Collusion in Appointment.

Where a physician is employed by poor directors and sues to recover his salary, it is not a sufficient defense to allege that his employment was by collusion between the poor directors, where there is no allegation that the physician was a party to the alleged collusion.

Contract of Employment—Physicians' Salaries.

Where poor directors employ two physicians who alternate in attendance upon the sick from week to week, so that each serves in reality only half of each year, and one sues for his salary, it is no defense to say that he should be paid but half of the compensation claimed, unless it is alleged that this method of service was contrary to his contract of employment.

Suits Against Poor Directors—Intervention of Taxpayer—Opinion of Taxpayer as to Suggested Defense.

The opinion of a taxpayer, unless founded upon facts sufficient for a defense, does not go to the merits of the claim so as to entitle him to intervene.

In the Court of Common Pleas of Berks County.

No. 9 August Term, 1916.

Rule for permission to intervene.

Rothermel & Mauger for rule.

Joseph R. Dickinson and William Kerper Stevens for plaintiff, contra.

Opinion by Wagner, J., September 22, 1917.—In an opinion filed in this case on November 5, 1916, upon a rule for judgment, we pointed out that the plaintiff's statement was sufficient, that he had a right to maintain this suit, and that the defendant had authority to employ two physicians.

The County Controller has petitioned the Court as the duly elected and qualified controller of Berks County, and as a citizen and taxpayer thereof, to intervene as a defendant. Under the Act of 23 March, 1877, P. L. 20, the petitioner, as a taxpayer, unquestionably has a right to intervene. Whether he has a right to do so as Controller was left undecided in *Heller vs. Bercaw*, 62 Pa. Superior Ct. 385, 389. To entitle a taxpayer to intervene he must, however, set forth in his petition that which affects the merits of the claim: *Maneval vs. Jackson Tp.* 141 Pa. 426. The mere fact that the Poor Directors do not propose to contest the claim is not a sufficient ground upon which to base an intervention by a taxpayer. "Where suit is brought against a township, the supervisors are not bound to subject the township to costs if they have no defence." *Maneval vs. Jackson Tp.*, supra. The position of the intervener is as stated in *Chester City vs. White*, 220 Pa. 646, on p. 650; "Admitting the right of the appellants to be heard as interveners, . . . such right allows them to do only that which the original party in whose shoes they stand might do; they are subject to the same limitations and restrictions."

The petitioner bases his right to intervene upon four grounds. The first is that the employment of the plaintiff by the defendant was collusive and was not made with a lawful regard for the best interests of the Poor District, or of the County of Berks, or of the County's poor. The petitioner then states the facts upon which he bases his allegation of collusion. It does not, however, appear from the petition, that the plaintiff in any way was a party to the alleged collusion. He is, therefore, not barred from payment for his services. This was squarely decided in *Sallade vs. Schuylkill County*, 19 Pa. Superior Ct., 191, where it is held: "An agreement between two out of three members of a poor board by which the appointments to offices are divided between them, and by which each binds himself to vote for any person that the other may name for a position to be filled by the board, without knowing who would be named, is illegal, immoral and contrary to public policy; but notwithstanding the illegality of such an agreement, if a person is appointed clerk of the board in pursuance thereof, and performs the services of the office, he will be entitled to his salary, if it appears that he was in no way connected with the illegal contract, either as principal or accessory."

In the other three paragraphs the petitioner charges that the physicians changed weekly in attendance upon the sick, alternating from week to week. That each of the physicians were employed during but half of the year—one week out of every two—and that he should be paid for no more than half the compensation claimed by him. He does not state that this method of service was contrary to the contract of employment. The petitioner then closes the petition by stating that he, being of the opinion that this method is grossly negligent, unprofessional and repugnant to the principles of common humanity, prays that he may intervene.

The opinion of a taxpayer, unless founded upon facts sufficient for a defense, does not go to the merits of a claim so as to entitle him to intervene. Otherwise taxpayers, under all circumstances, would have this right. We fail to see in this petition any just defense stated, under the law, to the merits of plaintiff's claim. Even if we allowed the petitioner to intervene, and he set up in his affidavit of defense the reasons he has advanced for intervening, we would be obliged to give judgment for plaintiff. For these reasons the rule to intervene is discharged.

SCHAEFFER vs. POOR DIRECTORS.

In the Court of Common Pleas of Berks County.

No. 80 June Term, 1916.

Rule for permission to intervene.

Rothermel & Mauger for rule.

Joseph R. Dickinson and William Kerper Stevens for plaintiff, contra.

Opinion by Wagner, J., September 22, 1917.—This is a case similar to Bingaman vs. Directors, etc., No. 9 August Term, 1916, and for the reasons therein set forth, the rule to intervene is discharged.

BURKHARD vs. BURKHARD.**Divorce—Desertion—Evidence.**

A divorce will not be granted on the ground of desertion where the husband, the libellant, testifies that when they were obliged to leave his house because it had been sold at sheriff's sale, he asked his wife to go with him to Hyde Park where he had rented a house, and she refused; and the only additional witness for libellant testified that he had been engaged to haul libellant's goods from his residence to Hyde Park; that he loaded libellant's plumbing tools, but no furniture; that then libellant asked his wife to go along, and she answered, "No, I won't go along with you," and that then libellant replied, "Oh, that is all I want to know." Respondent denied that she refused to live with him, and it was shown that after the separation libellant never attempted a reconciliation, and did not support his wife or children until an order was made against him in the Quarter Sessions Court.

Desertion—Evidence of Libellant—Subsequent Conduct as Affecting His Evidence.

In a suit for divorce on the ground of desertion the evidence given by the libellant on the matter of desertion must be viewed in the light of his subsequent conduct.

In the Court of Common Pleas of Berks County.

No. 11 September Term, 1916.

Divorce. Desertion.

Harry J. Dumn for libellant.

Rothermel & Mauger for respondent.

Felix P. Kremp, Master.

Opinion by Wagner, J., September 22, 1917.—The only evidence that bears directly upon desertion, which is alleged as the ground for divorce, is that of libellant and a witness, William Carl. The libellant testifies that on the first of April, 1914, after their house had been sold by the Sheriff, and they were obliged to leave, that he asked his wife to go with him to Hyde Park. He stated that he had rented a house there, and that she refused to go with him. William Carl testified that he had been engaged by the libellant to haul libellant's goods from his residence in Reading to Hyde Park. That he loaded the plumbing tools and implements that libellant used in his business, but no furniture. That when the tools, implements and stock were loaded, libellant then asked his wife to go along, and that she answered, "No, I won't go along with you," and that then libellant said, "Oh, that is all I want to know."

Libellant admits that from this time on until June 17, 1916, when an order for support in favor of the wife and two children was made against him in the Quarter Sessions Court of this county, he did absolutely nothing towards their support. That he never asked her to live with him or endeavored to affect a reconciliation. The wife also testified that during this period of time, more than two years, she had never seen him until he appeared in Court.

His evidence on the matter of desertion must be viewed in the light of his subsequent conduct. His evidence, even though not contradicted, would not be sufficient to establish his allegation of desertion on the part of the respondent. The respondent, however, denies that he asked her to go out to Hyde Park. She testifies that he told her he had rented a house at Hyde Park. That she then requested him to take her out to see the house, whereupon he admitted that he had not rented one.

The Master has found that the libellant has failed to make out a case of wilful and malicious desertion on the part of the respondent as required by law to sustain his libel. We find the same as the Master.

The exceptions to the Master's report are dismissed. The libel is dismissed at the cost of the libellant.

POULTON et al. vs. ELY.

Landlord and Tenant—Proceedings to Recover Possession—Act 31 March, 1905, P. L. 87—Plaintiff's Agent as Lessor—Certiorari.

Suit was brought before an alderman in the name of McGowan as agent for Ida Poulton et al. against Esther Ely, to recover possession of certain real estate alleged to have been leased to the defendant for an indeterminate term. The record of the alderman showed that the lease for the premises had been made with the defendant by Samuel N. Potteiger, agent. There was nothing to show that Ida Poulton was the original lessor or had acquired title to the property by descent or purchase from the original lessor. The alderman entered judgment for plaintiff. On certiorari, **Held**, that the record was fatally defective.

Lease Executed by Agent Without Disclosing Principal.

Where an agent, without disclosing his principal, executes a lease of a house in his own name, the tenant holds under the agent; and it makes no difference that the agent in signing the lease wrote the word "agent" after his signature.

In the Court of Common Pleas of Berks County.

No. 33 April Term, 1917.

Certiorari.

D. E. Schroeder for defendant and certiorari.

Paul H. Price for plaintiff.

Opinion by Wagner, J., September 22, 1917.—This is a proceeding to recover possession of premises by a landlord under the Act of 31 March, 1905, P. L. 87. The procedure for the purpose of obtaining possession, as provided for by the Act of 1905, must be under the Act of December 14, 1863, P. L. (1864) 1125; *Lehman vs. Lehman*, 19 Dist. Rep. 590; *Weill vs. Peifer*, 21 Dist. Rep. 606. Under this Act it was held that none but the immediate lessor could recover possession prior to the Act of February 20, 1867, P. L. 30, which extended the Act to apply to cases where the owner or owners of the demised premises had acquired title thereto by descent or purchase from the original lessor or lessors: *Rowan vs. Gates*, 9 Dist. Rep. 564. The essential facts to be found by the Justice are: "that the plaintiff was peaceably possessed of the premises, that he demised the same to the tenant in possession or to some one under whom he claims, that the term for which the same was demised is fully ended, and that three months' previous notice has been given of his desire to repossess the same." These facts must appear either in his judgment or he may find that the complaint which alleges these facts is true: *Givens vs. Miller*, 62 Pa. 133; *Xander vs. Weiss*, 12 Dist. Rep. 724. See also *Wolf vs. Brown*, 14 Dist. Rep. 88.

In this case the complaint is by William H. McGowan, as agent for Ida Poulton et al. He sets forth that Ida Poulton et al. are the owners of No. 110 North Seventh street, Reading, Pa.; that she demised the premises to Esther Ely, the defend-

ant, for an indeterminate term, at a monthly rental of Eight Dollars, to be paid cash. The record shows the lease to have been entered into for said premises between Samuel N. Potteiger, agent, as lessor, with Esther Ely, as lessee. Under this instrument the lessor is Samuel N. Potteiger; the lessee, Esther Ely. In *Seyfert vs. Bean*, 83 Pa. 450, it is held: "Where an agent, without disclosing his principal, executes a lease of a house in his own name, the tenant holds under the agent; and it makes no difference that the agent in signing the lease wrote the word 'agent' after his signature." Also on page 453, the Supreme Court says: "She leased the house of Boileau & Sankey. They let the premises to her. By the terms of the lease the relation of landlord and tenant was exclusively between them. In the body of the lease Boileau & Sankey are described as the sole lessors. It is true, at the foot they sign it as 'agents.' Agents for whom? The lease is silent. As is clearly shown in *Holt vs. Martin*, 1 P. F. Smith 499, in regard to a lease executed in a similar manner, the defendant did not thereby become the tenant of an unknown landlord."

There is nothing whatever in this record to show that Ida Poulton was either the original lessor or the purchaser or descendant of the original lessor. The record does not show this essential feature to support the judgment entered by the Alderman. For this reason it cannot stand.

The exception "2b" is sustained, judgment is reversed and the proceeding set aside.

SHEPHERD vs. SCHLEGEL.

Workmen's Compensation Board—Appeal From Decision—Hearsay Evidence.

Where a person dies as the result of a slight scratch on the nose which became infected, and the only evidence as to the source of the injury and of the place where it occurred is the testimony of three witnesses, relatives of the deceased, who testified that they heard deceased say that a piece of lumber hit him on the nose while he was working, producing a scratch, the claimant has failed to sustain the burden of proof resting upon her to show that the death of the decedent was caused by an injury sustained while in the course of his employment. The evidence, not being part of the *res gestae*, was merely hearsay, which, although admissible in hearings before the workmen's compensation board because it may lead to the discovery of substantive evidence that will conclusively determine the real facts of the case, yet is not of itself evidence upon which a decision can be founded.

Workmen's Compensation Board—Appeals.

An appeal to Court from the decision of the Workmen's Compensation Board does not lie upon questions of fact, but only upon questions of law.

In the Court of Common Pleas of Berks County.

No. 93 February Term, 1917.

Appeal from decision of Workmen's Compensation Board.

Claim petition No. 1266.

Harvey F. Heinly for plaintiff, appellant.

E. H. Deysher for defendant.

Opinion by Wagner, J., October 1, 1917.—This is an appeal of Mary S. Shepherd from the decision of the Workmen's Compensation Board. At the argument it was conceded that upon questions of fact no appeal lies. That only where a question of law arises can an appeal be taken to the courts.

The testimony in this case as to the source of the alleged actual injury claimed to have been received is the hearsay evidence of Mrs. Shepherd. She testified that her husband stated that the day upon which the accident occurred was very windy, and that by reason thereof he was overbalanced at the place where he worked, and a piece of lumber hit him on the nose, producing a tiny scratch. From this injury it is contended that he became infected, and erysipelas resulted, from which he died. Charles A. Dougherty, a son-in-law, and Mrs. Anna Dougherty, a daughter, testified that they heard the decedent make the same statement as to the accident that had happened to him. The first doctor who was consulted was Dr. George K. Levan. He testified that deceased came to his office on a Saturday afternoon; that after an examination he prescribed for an acute cold; that the next day he called upon him and at once saw that the deceased was suffering from erysipelas. He said the deceased did not state anything to him that he recently had received an injury. He testified that in his opinion he died from erysipelas and nothing else. George Swoyer testified that on the day of the alleged accident he was working with the deceased; that he worked beside him—that they worked together; that he was with him all the time, and that he was not hurt on that day. That if he had been hurt he would have known it, and that the deceased never said anything to him about a board hitting him on the nose. That on the evening of the alleged accident they came home together and he saw nothing of a scratch on deceased's nose. Dr. Clarence M. Kurtz testified that he had attended deceased; that deceased informed him that he got an injury by being hurt with a plank. That he had a sore on the nose where the deceased claimed he had been struck by the timber, and said that this injury was evidently the source of the infection, and that he died as a result of erysipelas. On this evidence appellant

contends that as a matter of law the Referee and the Board were required to make a finding in favor of the claimant.

The Referee, in his reasons for disallowance, states that "After giving due consideration to all the testimony in this case, the Referee decides that the claimant has failed to sustain the burden of proof which rests upon the claimant to show that death of decedent was caused by an injury sustained while in the course of his employment, or such disease or infection as would naturally result therefrom." This decision, although stated under his "Reasons for Disallowance," is a finding of fact that death was not the result of an injury sustained while in the course of employment. To this finding of fact there is no appeal. Appellant contends that there is no warrant for this specific finding in that the corroborative evidence was such as to compel the Referee to find as a matter of law that the hearsay evidence of the three witnesses must be accepted as true. That is, that this case comes before us like a case where judgment *n. o. v.* has been entered. We fail to see, even if this question be considered as one of law, any error in the Referee's finding. In *Andrulis vs. Delaware & Hudson Company*, 2 Dept. Rep., 1325, the rule has been laid down that "The admission of hearsay statements may lead to the discovery of substantive evidence that will conclusively determine the real facts of a given case. There may be instances where a hearsay statement is so completely corroborated by the surrounding circumstances and probabilities that it is thoroughly convincing and a judicial tribunal will be justified in adopting it as an established fact."

The question here to be determined was, even if such an injury as testified to did exist, where was that injury received? Of that material fact we have nothing but hearsay evidence of the three witnesses, relatives of the deceased. What the deceased said to these witnesses cannot be considered part of the *res gestae*. It was not stated to the fellow-workman, George Swoyer, at the time and place of occurrence: *Maude A. White vs. Baldwin Locomotive Works*, 3 Dept. Reps. 1198. Neither did this hearsay evidence tend to the discovery of such evidence as would have justified the Referee in deciding that the alleged injury was received as testified to in the hearsay evidence. In *Botto et al. vs. W. C. Hamilton, et al.*, 3 Dept. Rep. 198, on page 199, Judge Finletter says there is nothing in the Workmen's Compensation Act which permits an award upon hearsay testimony. "The provision of Section 428, properly interpreted, lead to no such result. . . . Any such radical change in the wise rules of evidence, founded upon experience, which exclude gossip and hearsay as unsafe sources of proof would require more compelling language than that of Section 428, which is 'Neither the Board or any Referee shall be bound

by the technical rules of evidence in conducting any hearing or investigation.' " Even, therefore, if we consider this appeal as one founded upon a question of law, we are not of the opinion that there is that in the evidence which would warrant a reversal in this case.

The appeal is dismissed at costs of appellant.

IN RE FISHER'S PETITION.

Real Estate—Parol Contract—Act 10 March 1818, Sec. 1, 7 Sm. 79—Necessary Averments in Petition.

Petitioner claimed title to certain land under a parol contract between him and his deceased brother, and asked the Court to appoint a day for the examination of witnesses in support of the contract, under Act 10 March 1818, Sec. 1, 7 Sm. 79, which applies to contracts not within the statute of frauds. Other claimants to the real estate filed an answer to the petition, averring want of jurisdiction. **Held:** that in order to take the case out of the statute of frauds the petitioner must establish and set forth in his petition the fact that the change of possession was notorious and the fact that it has been exclusive, continuous and maintained; and also that the petitioner has fulfilled his part of the alleged contract; and as none of these essentials were set forth in the petition, it must be refused.

In the Court of Common Pleas of Berks County.

No. 38 May Term, 1917.

Petition to establish parol contract concerning land.

Henry D. Green for petitioner.

Thomas K. Leidy and Edwin Kline for Kercher and Fisher.

Edward D. Trexler for Ebert and Schott.

Opinion by Wagner, J., October 1, 1917.—This is a petition of Benjamin G. Fisher, under the Act of 10 March, 1818, Sec. 1, 7 Sm. 79, wherein he claims title to certain lands described in his petition upon a parol contract which he alleges was entered into between him and his deceased brother, Samuel G. Fisher, in which he prays the Court to appoint a day certain for the examination of witnesses in support of his alleged contract. A rule was granted to show cause why the prayer should not be granted. Notice of this rule was served upon the persons interested in the estate of Samuel G. Fisher, deceased.

In their answer they aver want of jurisdiction in the Court upon the facts alleged in the petition. The Act of 1818 provides that "if, upon the exhibition of such petition, the Court shall be of opinion that the case therein disclosed doth not

come within the meaning of the Act of Assembly, entitled 'An Act for the prevention of frauds and perjuries,' passed the 21st day of March, Anno Domini, 1772, they shall grant the prayer of the petitioner, and award his subpoenas for his witnesses."

The heirs of said Samuel G. Fisher contend that the averments of the petition are not such as to take this alleged contract out of the said Act of 21 March, 1772. The petition, *inter alia*, avers an agreement between the petitioner and the deceased and then states: "That in accordance with said agreement, the possession of said real estate was taken and held jointly by your petitioner and decedent and so carried on from the time of said contract until the death of the said Samuel G. Fisher." Also that "the lands were to become the absolute property of the said petitioner subject to the payment of the encumbrances upon the same and any debts due and owing by decedent at the time of his death, should the petitioner survive decedent, and that, should petitioner die first, the said Samuel G. Fisher was to own absolutely, said lands, free and clear from any claim your petitioner had upon the same, at the time of his death, upon the said Samuel G. Fisher paying all the debts due by your said petitioner on the happening of that event."

To take a case out of the statute of frauds and perjuries the petitioner, *inter alia*, must establish and therefore set forth in his petition "the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous and maintained:" *Hart vs. Carroll*, 85 Pa. 508, 510; *Wright vs. Nulton*, 219 Pa. 253, 256; *Schmidt vs. Lieberum*, 51 Pa. Superior Ct. 591, 596. The petition fails to set forth any of these essentials. On the contrary it states that the decedent purchased the property from a third party, and after this purchase continued to live with the petitioner, upon the premises until the time of his death.

The consideration alleged is that upon the death of either, the survivor was to pay all the debts due by the deceased. The petition does not state one single act done by petitioner in pursuance of this agreement which would make a rescission of this alleged parol agreement inequitable and unjust. It does not even aver that any debts had been paid by the petitioner and that therefore there was part performance by the vendee. Whatever services, if any, were performed by the petitioner, can easily be compensated in damages. Here again an essential to take this parol agreement out of the Statute of Frauds and Perjuries is wanting. The petition does not show, as required under the Act of 1818, that the case does not come within the Act of 21 March, 1772.

The rule is therefore discharged.

ALLENTOWN PORTLAND CEMENT CO. vs. HUY et al.**Water Courses—Rights of Riparian Owners—Prescriptive Right to Use Water—Waste—Equity—Injunction.**

Where the owner of a mill operated from a dam in a stream, allows the dam breast, head-race, fore-bay and pen-stock to remain in a state of disrepair, whereby a large percentage of the water from the stream leaks away and is wasted, thus depriving a lower riparian owner of the use of the water, which, if not thus wasted, would pass to his property, and its loss is an injury to his manufacturing plant on the stream, the upper riparian owner will be restrained by injunction from allowing the water to be wasted by lack of proper repair.

In the Court of Common Pleas of Berks County. In Equity.

No. 1117 Equity Docket, 1913.

On bill, answer and testimony.

Cyrus G. Derr and George W. Aubrey for plaintiff.

John B. Stevens for defendant.

FINDINGS OF FACT.**Opinion by Wagner, J., October 20, 1917.—**

1. The plaintiff is a corporation organized under the laws of the State of New Jersey, for the purpose of engaging in the quarrying of cement rock and the manufacture and sale of Portland Cement. Under the laws of the State of Pennsylvania, with the requirements of which the plaintiff has complied, it has the power to take, have and hold real estate in Pennsylvania necessary and proper for its corporate purposes.

2. The plaintiff has acquired and owns 256 acres of land, situate in Maiden Creek Township, Berks County, Pennsylvania. Upon said land is a large deposit of cement rock. The plaintiff upon said land has erected suitable buildings, machinery and appliances for the quarrying of cement rock and the manufacture thereof of Portland Cement.

3. Plaintiff's aforesaid land has a frontage of upward of 3,000 feet on a stream of water flowing through Maiden Creek Township, the boundary line thereof being in the middle of the stream.

4. The defendants own and are in possession of a mill property situate on the side of said Maiden Creek stream opposite to the land of the plaintiff, with a dam and a dam breast across the stream at a point on plaintiff's land and above plaintiff's aforesaid manufactory. From the dam extends a head-race, a fore-bay, and a pen-stock leading to the mill. A tail-race extends from the mill to the Maiden Creek at a point in the stream where none of the water which flows from the dam into the head-race comes or can come to plaintiff's plant.

5. Plaintiff's quarries and cement factory are large and extensive. It has invested in its entire property more than one and a half million dollars. It employs in its operation from 170 to 180 men, and requires an ample supply of water to properly and more economically run its plant by means of a condensing system. An insufficient supply of water compels the plaintiff to disuse the condensing feature of its plant and thereby increases the cost of operation from \$250 to \$300 per day.

6. The defendants' mill is an old one, and has been operated as a mill for over a hundred years. It has a patronage of about 40 customers.

7. Defendants' mill property, at the time of the filing of this bill, for four or more years prior thereto, and since, has been in a state of disrepair, in that there are allowed to exist for an unreasonable length of time large leaks in the dam breast, the head-race, the fore-bay, and the pen-stock. By these leaks from 15 per cent. to 40 per cent. of the water that passes from the dam to the head-race leaks away and is wasted. Plaintiff is thereby deprived of the use of this water, which if not thus wasted would pass to plaintiff's property and would be sufficient to run its plant by the condensing system.

DISCUSSION.

The complaint of the plaintiff is that the defendants in the exercise of their prescriptive right to take the water of the Maiden creek for mill purposes are taking more than is reasonably necessary for the operation of their mill; that is, that defendants by allowing leaks to exist for an unreasonable length of time in the dam-breast, head-race, fore-bay and pen-stock, waste from 15 to 40 per cent. of the water which would otherwise come to plaintiff's property, and that thus defendants injure plaintiff's business.

Plaintiff's witnesses testified that prior to the filing of the bill in January, 1914, and since, the defendants have failed to keep in reasonable repair the dam-breast, head-race, fore-bay and pen-stock, by allowing leaks therein to continue for a long period of time.

The rule as to the right of the riparian owner is thus stated in 30 A. & E. Enc. of Law, 2d Ed., pages 354, 355: "As a general rule, a riparian owner is entitled, in the absence of grant, license, or prescription limiting his rights, to have the watercourse which washes his land flow as it is wont by nature to flow, without material alteration or diminution as to either quantity or quality. The right to the natural flow of the watercourse is subject, however, to the limitation that each riparian proprietor is entitled to a reasonable use of the water for certain purposes though such use may diminish the

natural flow of the watercourse to lower riparian proprietors. The respective rights of the several riparian owners must, for the protection of their mutual rights, be enjoyed in such a reasonable manner as not to injure unnecessarily the rights of others."

In this case we have the admitted prescriptive right of the defendants to use the water for mill purposes. This prescriptive right, however, does not give any right to waste water. The amount of water that can be used by the defendants is only that which is reasonably necessary, together with necessary waste, for its prescriptive right to use the water for its mill operations. In *Irving vs. Media Borough*, 10 Pa. Superior Ct. 132, on page 148, affirmed in 194 Pa. 648, we have: "The extent of the presumed right is determined by the user on which is grounded the presumed grant; the right granted being commensurate with the right enjoyed." *Angell on Water Courses* (7th ed.), 389. "The extent of the prescriptive right is measured by the extent of the enjoyment, and is confined to the right as exercised originally." 28 Am. & Eng. Ency. of Law, 1012. "The user which originated the right (to pollute a stream) must also be its measure, and it cannot be enlarged to the prejudice of any other person." *Crossley vs. Lightowler*, L. R., 2 Ch. 478, quoted in *Gould on Waters*, sec. 345. This doctrine is recognized in our own cases, and we discover no reason for refusing to apply it here: *Darlington vs. Painter*, 7 Pa. 473; *Mertz vs. Dorney*, 25 Pa. 519; *Jones vs. Crow*, 32 Pa. 398; *McCallum vs. Germantown Water Co.*, 54 Pa. 40, 48; *Chestnut Hill, etc., Turnpike Co. vs. Piper*, 77 Pa. 432. See also *Bealey vs. Shaw*, supra, *Prentice vs. Geiger*, 74 N. Y. 342, and *Hogg vs. Bailey*, 5 Pa. Superior Ct. 426, 435." We consider it therefore plain that the unnecessary and unreasonable waste of water by the defendants through failure to properly keep in repair and maintenance its dam-breast, head-race, fore-bay, and pen-stock by reason of which the waters of the Maiden creek are diverted from plaintiff's property, is such an injury for the restraint of which the plaintiff's are entitled to a permanent injunction.

Plaintiff has presented a number of requests for Findings of Fact and Findings of Law. What is material in these to the determination of this question, we have in substance affirmed by our Findings of Fact and Law.

FINDINGS OF LAW.

1. Defendants' right to the water of the stream does not exceed a right to take more water than is reasonably necessary for the operation of their mill for the business which comes to it. The defendants have no right to waste the water. The plaintiff is entitled as a riparian owner on the opposite side

of the stream to the use of such water as may not be reasonably necessary to the defendants' right of water to operate their said mill.

2. That the plaintiff is entitled to a decree for a permanent injunction restraining the defendants, their agents and employees perpetually hereafter from taking from the said dam, and through the said head-race, more water than is reasonably necessary to operate the said mill for the business which comes to it, and from wasting water through the dam-breast, head-race, pen-stock and fore-bay not kept in a reasonable state of repair.

3. The costs of this proceeding are to be paid by the defendants.

And now, to wit, October 20, 1917, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

COMMONWEALTH vs. BROWN.

Criminal Law—Larceny—Evidence—New Trial.

A new trial will not be granted after a conviction on the charge of larceny where the evidence shows a stolen automobile found in the possession of the defendant a few hours after the theft occurred, with a changed license, the ornament removed, the top turned down, and the defendant in company with another man who had charge of another car stolen at about the same time and place, and the defendant offers no satisfactory explanation of his possession of the stolen car.

Evidence—Witnesses—Credibility.

Contradictions in a witness' testimony always affect the credibility of the witness, and calling the jury's attention in the charge to such contradictions is proper.

Evidence—Witnesses—Character Witness.

Where a character witness undertakes to swear that the defendant's reputation for honesty was good, and then admits under cross-examination that prior to the theft of which the defendant was accused, he did not know a single person in the neighborhood who knew the defendant, the Court properly charged that the jury must consider the witness' means and opportunity of knowing the defendant's reputation.

In the Court of Quarter Sessions of Berks County.

No. 143 March Sessions, 1917.

Larceny: Rule for new trial.

Harry J. Dumn and E. H. Deysher for defendant and rule.

Wilson S. Rothermel, District Attorney, contra.

Opinion by Wagner, J., October 15, 1917.—The defendant, Quintor Brown, was found guilty of the larceny of a

Buick automobile. He has filed a number of reasons for a new trial, the first two of which are that the verdict is contrary to the law and to the evidence.

It was admitted that this automobile was stolen in Reading several hours prior to the time that it was found in the possession of the defendant at Pottstown. It was also not denied that the license tag had been changed—that is, that the license tag had been taken from a Ford automobile and placed on the Buick car, and the Buick license changed to the Ford car—that there was an interchange of license tags. The Ford car had also been stolen in Reading on the same evening, and was found at about the same time the Buick car was found in Pottstown, in the possession of Kehr, who had been with the defendant in Reading during the evening. Both cars had gone from Reading to Pottstown, Kehr being in the Ford car, and the defendant in the Buick. It was also testified, and not denied, that the top of the Buick car was thrown down, and the ornament on the front of the car taken off. It is evident from this that the identity of the cars was attempted to be changed so as to disguise them.

L. B. Reifsnnyder, chief of police, Pottstown, testified that shortly after nine o'clock on February 24 he received a telephone call from City Hall, Reading, stating that a Ford touring car bearing license No. 23876 had been stolen. That about twenty minutes of twelve Officer Beam "ran into that number on West High street," but that instead of the license number being on a Ford car, it was on a Buick car. That he went to the place where this Buick car was and there saw a Mr. Kirlin and the defendant. That his officer, Mr. Beam, said, "Who operates this car, who runs this car?" The defendant said, "I do." That he also asked him who the owner was, and that defendant said he was the owner. This evidence was corroborated by the evidence of William Y. Beam, police officer of Pottstown, and also by J. Raymond Kirlin.

Mr. Kirlin testified that he saw the defendant at a garage in Pottstown on that evening. That defendant came there to get a tire changed; that the night man at the garage took the inner tube out and changed the tire on the rims; that he fixed the tube and put it back again. That the defendant paid him for his services, and when the witness asked where the car was, defendant said, "Down street." That he then stated to the defendant that he would put on the tire for him, went along with defendant, and while engaged in putting the tire on the wheel the officers arrested defendant. That this was between eleven thirty and twenty minutes of twelve, and that the car was headed for Philadelphia.

We have, therefore, from this evidence a stolen automobile found in the possession of this defendant a few hours after the

same had been stolen, with a changed license, the ornament removed, the top turned down, and the defendant in company with Kehr, who had charge of a car also stolen at about the same time and place. This was clearly strong evidence bearing upon the guilt of this defendant, and evidence of such a character as fully warranted the conviction of this defendant, under the law, unless the possession of the stolen property was satisfactorily explained: *Pennsylvania vs. Myers*, Add. Pa. 320; *Com. vs. Devine*, 18 Pa. Superior Ct., 431; *Com. vs. Berney*, 28 Pa. Superior Ct., 61; *Greenleaf on Evidence*, 4 Ed., Vol. 1, Secs. 11, 34.

The defendant's explanation of the possession of the car was that he was in Reading on this evening; that he there met Kehr, a basket ball player, and four others. He could not give the names of the other four. He stated one of the party proposed that they go to Pottstown. That these other persons had the cars on the outside when he, with them, came out of the hotel where they had been. He and three others were in the Buick car, and Kehr and the other two were in the Ford car. What became of the other five after they got to Pottstown was not disclosed. He testified that they left and went to a saloon, "and then I went down to the saloon and tried to locate them, to look for them, but I couldn't find them (N. of T. p. 31)." These men thus disappeared from the scene, and the whereabouts of none of them has since been discovered. The defense is the old and familiar story of having received the stolen property from an unknown person whose whereabouts remain undiscovered.

The defendant called as a witness to show that he had been at this saloon in Reading on this evening with the others, a bartender, William Welsh. He, however, nowhere in his testimony associates the defendant with more than two others. He remembered Kehr, this defendant, and another person. He stated that when this defendant finally left the three persons went away together. On this testimony it can hardly be claimed that the verdict of guilty was contrary to the law and the evidence.

Defendant complains about two matters specifically contained in the charge. The first relates to that part of the charge where the Court referred to the contradiction by the defendant in his testimony with reference to the name of the person claimed to be the third party with this defendant and Kehr. Counsel contends that:

"The Court erred in neglecting to further interrogate the defendant concerning the name of Christ Leonard, when the defendant made the mistake in giving his name as Weand Kennedy, and then, in the charge, calling the attention of the jury to the discrepancy in defendant's testimony, without affording him the opportunity to explain."

There is absolutely no testimony in this case to show that the defendant made a mistake when he testified that the name of this person was Weand Kennedy. On the first day of the trial (N. of T., p. 29) he stated that the name of this third man, the basket ball player, was Christ Leonard. On the second day of the trial, upon being recalled by the District Attorney (p. 35), and asked the name of the other person, the witness referred to a book. The Court thereupon said, "Don't you know without referring to the book?" He answered, "I don't know his name without referring. I didn't know his name until after that. Kennedy." When still further questioned we have:

"Q: What is his first name? A. Weand Kennedy.

"Q. He was the basket ball player? A. Yes, sir, absolutely."

Later on the District Attorney asked him if Kennedy was the name of the man who was missing. He said, "Yes, sir, he was supposed to play, he was supposed to jump centre for the Jasper Team (N. of T., p. 36)." Then again on p. 39, when questioned by the District Attorney as to whether he had seen any of these four men whose names he did not know, since that night, he said he had not, "except one of the men's pictures." The Court then asked these questions:

"Q. You saw one of the men's pictures? A. Yes, sir, Mr. Kennedy.

"Q. He is the basket ball player? A. Yes, sir.

"Q. Where does he live? A. He lives in New Hampshire."

We have, therefore, on the first day of the trial his testimony as to the name of this third party as Christ Leonard; and on the second day of the trial his statement three times that it was Weand Kennedy. We fail to see any error in the failure of the Court to further interrogate this defendant, when, as defendant's counsel alleges, but of which there is no proof, that defendant made a mistake in giving the name as Weand Kennedy. He had three times given the name as Weand Kennedy, and yet his counsel at no time during the trial attempted to have the alleged mistake corrected. Contradictions in a witness' testimony always affect the credibility of the witness, and calling the jury's attention in the charge to this, as affecting the defendant's credibility, was proper: *McConkey vs. The Commonwealth*, 161 Pa. 416.

The other part of the charge complained of was that relating to defendant's three character witnesses. In the charge we first instructed the jury on the value of evidence of good character. To this portion of the charge there is no complaint. We then stated: "But in considering this evidence of good character, you must consider, when these persons say that the defendant had a good character for honesty, their means and opportunity of knowing that." In *Com. vs. Howe*,

35 Pa. Superior Ct. 554, on p. 563, we have: "The question is what is said by people in general? That is the true point of inquiry, and everything which stops short of it, is incorrect.' Before the witness is qualified to speak it must appear that he is acquainted with the general reputation of the person with respect to the particular character involved, in the neighborhood in which he resides. If it appear that he has this knowledge he is competent to testify concerning it; otherwise, not." Also in *Com. vs. Wilson*, 44 Pa. Superior Ct., 183, on p. 190, we have: "A witness who testifies to the general good reputation of one accused may be tested by asking him on cross-examination as to reports which he has heard or contradictory statements he has made, or other facts known to him, not for the purpose of discrediting the person whose reputation is involved, but solely for the purpose of affecting the credibility of the witness." One of the character witnesses was Ernst L. Poole. He said he lived in Reading for two years; was an instructor at the Reading High School, and he had first met this defendant about twelve years ago in Philadelphia, where they both attended the Industrial Art School. He was asked whether he knew people who knew him. He answered he did. Then he was asked whether he knew his reputation for honesty. He said that he did, and that it was good. When tested by the District Attorney as to the value of this testimony of his, he answered, when questioned: (N. of T., p. 44).

"Q. Who do you know in Philadelphia that knows Brown? A. I know some of the instructors of the Industrial Art School, and several of the boys in the neighborhood who knew him.

"Q. How long ago was it that he attended that school? A. It was between 11 and 13 years ago."

On re-direct examination he was asked whether he also knew people in Reading who knew Mr. Brown. He said he did. When asked whether he knew them at the present time, he said he did, and when asked whether he knew defendant's reputation in Reading, he answered he did and that it was good. In testing this evidence as to his good reputation in Reading, the District Attorney asked whether the witness knew anybody in Reading who knew this defendant, to which he replied he did. He said he had had a talk with a Mr. Sipe, but when asked by the Court whether he knew any one in Reading that knew him before February 24—prior to this occurrence—he answered that he was not certain on that point. Then when questioned by the District Attorney, "You don't know a single one, do you?" he answered, "No, sir." The importance of this test is plainly evident because this witness here undertakes to swear that the defendant's reputation in Reading for honesty was good, and then afterwards admits that he knew of only one person who knew him, and that prior

to the occurrence of this theft he did not know one individual in Reading who knew him. Such testimony is worthless, and had the test been put to this witness before he answered what defendant's reputation was, the Court would have been obliged to reject it as being incompetent. The same test, that is, the means and opportunity of the witness to know the character of defendant was equally applicable to the other two character witnesses.

Rule for new trial discharged.

BEAM, Ex'x, vs. RICHARD, et al.

Pleading—Promissory Notes—Suit by Executrix.

Where an executrix accepts a promissory note made to her individually by a creditor of the estate, she may sue upon the note either individually or as executrix.

Evidence—Competency—Act 23 May, 1887, Sec. 5, (E), P. L. 159.

Where the subject of a suit is a promissory note given by defendant to an executrix in payment of a debt due the decedent, the testimony of the executrix is competent to show the consideration by stating what was said to her by the defendant at the time the note was given. The Act of 1887 does not apply, as the giving of the note was a transaction between the witness and the defendants, and not between the decedent and the defendants.

In such a case the testimony of the defendant that she was not indebted to the estate of decedent is incompetent, since such testimony would relate to transactions between the witness and the decedent, and fall within the provisions of the Act of 1887.

In the Court of Common Pleas of Berks County.

No. 131 August Term, 1916.

Assumpsit: Rule for new trial.

E. H. Deysher and Earle I. Koch for defendants and rule.

Silas R. Rothermel for plaintiff.

Opinion by Wagner, J., October 15, 1917.—This is an action brought by Elizabeth Beam, as executrix, against the defendants, upon a promissory note for \$950, dated March 31, 1915, made payable to her individually. The statement avers that this note was given by defendants on account of a sum which was due and owing the decedent, Moses Beam, by the defendants at the time of his death for land conveyed and sold by him to Ella Richard, in his lifetime.

One of the reasons advanced at the trial as a defense to the suit and argued as a reason for a new trial, was that the note was made to the plaintiff in her individual capacity and not as executrix of the estate of Moses Beam, deceased, and

that therefore this action by her as personal representative could not be maintained.

It is plain from the pleadings in this case, together with the evidence thereon, that the fruits of a recovery on this promissory note will be assets of the estate of Moses Beam, deceased. In 18 Cyc, pp. 874, 875, we have this: "The rule seems to be well settled that if the fruits of the recovery will be assets the representative may declare either in his representative capacity or in his own name. This rule applies equally whether the action is on tort or contract, and whether the consideration flows from the decedent or the representative." The rule thus stated applies to actions on notes: see *supra*. In *Boggs, Administrator of Boggs vs. Bard and others, Executors of Johnson*, 2 Rawle 102, it is held: "Where the debt to be recovered is assets, the plaintiff may name himself administrator, and sue as such on contract made by him." See also *Peries vs. Aycinena*, 3 W. & S. 64. This defense to the action cannot, therefore, be sustained.

Defendants assign as a reason for a new trial error in the admission against defendants' objection, of the evidence of Elizabeth Beam as to the consideration for this note. On page 1, N. of T., counsel for plaintiff handed the note to the witness and asked her whether she recognized it. Upon her answering in the affirmative, counsel for defendants requested an offer. Whereupon counsel for plaintiff stated: "The note is admitted but the purpose for which it was given is denied. I want to show the purpose for which the note was given; that is, the consideration. We offer to show that the consideration, \$950, so expressed in the note, was given as the balance due on some purchase money for a farm situated in Caernarvon Township, which the parties admit to have purchased, and for which a deed was given by Moses Beam." To this defendants objected, assigning a number of reasons, one of which was that "Moses Beam, one of the parties to the transaction, is dead, and therefore the witness is incompetent," under Act of May 23, 1887, Sec. 5, (E), P. L. 159.

The giving of this note was a transaction between this witness and the defendants, and not between Moses Beam and the defendants. This witness was, therefore, competent to testify to that which, at the time of the giving of the note, was stated by them to be its consideration. The objection of counsel was to the offer to show the consideration, and not to the form of the question which followed the overruling of the objection to the offer. It was only when plaintiff's counsel (p. 2, N. of T.) asked the witness what conversation she had with Ella Richard that there was an objection to the question asked. This evidence was clearly admissible as showing admissions to the witness, the personal representative of the deceased, of indebtedness as bearing upon the consideration for

which subsequently the note in question was given. Her testimony was that she and Ella Richard went to Mr. Friday's (an attorney) office to get a settlement from her (Ella Richard) of the balance due from her on the land conveyed by the decedent during his lifetime. That they there both agreed to have a note or mortgage drawn up for \$1,000, that being about the amount agreed to be due. That if subsequently it was determined that this amount was more than the indebtedness, that then Mrs. Beam was to pay her the balance between the \$1,000 for which the mortgage or note was given and the amount due. But if this note or mortgage for \$1,000 was not sufficient to cover the indebtedness of the defendants, then the defendants were to pay to the witness the amount of indebtedness which was more than the amount of \$1,000. That subsequently, upon the husband refusing to sign the papers which had been drawn up in Mr. Friday's office, Mrs. Richard figured up and determined the amount due, and that then the promissory note in question for \$950 was delivered by defendants to this plaintiff. An examination of her evidence shows that it was limited to the transaction between the plaintiff and the defendants, and related to the consideration for which the note was given. It was therefore not incompetent under the Act of 1887.

Another matter alleged as error is that the Court sustained the objection to this question put to Mrs. Richard (N. of T., p. 29): "State whether or not you were indebted to your father's estate in the sum of \$950 for real estate purchased from him?" That question as it stood related not to the occurrences of the time when this note was signed, but to transactions between the decedent and this witness as a defendant, and consequently was not admissible under said Act of 1887. Her evidence was excluded only as it bore upon the transactions between her and her father. When she was questioned as to what she had said in Mr. Friday's office with reference to an indebtedness to her father's estate there was no objection, and her evidence was admitted. She testified that she had not there said that she was indebted to her father's estate or that this note was given upon and in consequence of an indebtedness by her to her father's estate. She testified that the consideration for the note was for farm stock received or to be received to the extent of \$950 from the plaintiff individually, and that by reason of the return of the farm stock to plaintiff, the indebtedness represented by the note was wiped out. We do not consider that there was any error in excluding her evidence bearing upon the transaction between her and her father.

Reasons for new trial discharged.

MARBURGER'S ESTATE.**Wills—Construction.**

Decedent's will provided that a portion of his estate should be held in trust and one-third of the income therefrom was to be paid to his son Charles, and two-thirds for the support of Charles' daughter, Eva May, until she reached the age of twenty-one years, after which her share of the income should be allowed to accumulate until the death of Charles, when the principal of the fund was to be divided among the children of Charles. He further provided that in case Eva May should be physically unable to support herself when she arrived at the age of twenty-one, the trustee should continue paying her the two-third income from the fund. After Eva May became twenty-one years old, she was incapable of self-support. Charles died, leaving eight children, including Eva May, who claimed that the trust should be continued and the two-thirds income paid to her. **Held:** that the provision that the income should be paid to her after she reached the age of twenty-one years in case she was incapable of self-support meant that she was only to receive it until her father's death, and that the fund was distributable to the heirs of Charles.

Wills—Bequests

A clear and direct bequest or devise will not be affected by a later clause of doubtful import.

In the Orphans' Court of Berks County.

J. Wilmer Fisher for accountant.

Opinion by Schaeffer, P. J., October 20, 1917.—The decedent died on the 3rd day of November, 1910, testate and married, having by his last will and testament disposed of that part of his estate embraced in the account, as follows:

"Third:—I give, devise and bequeath to my son John Mahlon in trust, for my wife Esther, during her natural life, the residue and remainder of my estate, both personal and real, he, (the trustee) to pay to her (my wife) the entire income on the same semi-annually, and if said income shall at any time fall below Four Hundred dollars (\$400.00) per annum, then he, (the said trustee) shall pay to her the difference from the principal of the estate remaining, so as to raise the sum to that amount.

"Fourth:—Upon the death of my wife, Esther, I bequeath to my son John Mahlon and my daughter Sarah Rebecca, each the sum of Five Hundred dollars (\$500.00).

"Fifth:—The remainder of the estate after being converted into cash shall be divided into three equal shares, of which I give, devise and bequeath as follows, to wit:—One share to my son John Mahlon, one share to my daughter Sarah Rebecca, and one share to my son John Mahlon in trust for my son Charles Elvert, and my grand-daughter Eva May, he (the trustee) to pay semi-annually one-third of the interest derived from this share to my son Charles Elvert, and two-thirds towards the support of my grand-daughter Eva May, who shall then be in charge of my daughter Sarah Rebecca until she is twenty-one years of age. After my

grand-daughter Eva May is twenty-one years of age she shall no longer receive any of the income from the money willed in trust for her, but the two-thirds interest derived from the money willed in trust for my son Charles Elvert and my grand-daughter Eva May, shall be added to the said trust fund as often as it becomes due, and upon the death of my son Charles Elvert, the said trust shall terminate, and the trustee shall pay the money in said trust fund over to his children, to whom I give, devise and bequeath the same absolutely share and share alike.

"Ninth:—In case my grand-daughter Eva May shall be physically unable to support herself decently when she arrives at the age of twenty-one, then the trustee shall continue paying her the two-thirds interest from the trust fund created for that purpose."

By a codicil to his will, he revoked the bequest of \$500.00 to his daughter, Sarah Rebecca Folk.

Esther Marburger, the cestui que trust, having died on July 7, 1916, the trust terminated, and the trustee has filed his account. It contains the corpus of the fund and income accrued since her death. Of the former, the balance for distribution is shown to be \$10,142.51, and of the latter, \$652.16.

For purposes of distribution the funds may be blended.

With regard to the distribution, it is to be noted that the son, Charles Elvert Marburger, has died since testator's death, leaving to survive him the following children, viz: John, Charles, Martin, Eva May, Edith, Emma and Esther Marburger; and, it having been stated on the record that Eva May is physically incapable of self-support, a question has been raised as to whether she is entitled to two-thirds of the income on that part of the fund directed by the will to be held in trust for her and her deceased father.

The fifth item of the will provides, inter alia, that "after my grand-daughter Eva May is twenty-one years of age she shall no longer receive any of the income from the money willed in trust for her," and then directs an accumulation of the income during the remainder of Charles Elvert's life, after which "the said trust shall terminate, and the trustee shall pay the money in said trust fund over to his children." In the ninth item testator further provides: "In case my grand-daughter Eva May shall be physically unable to support herself decently when she arrives at the age of twenty-one, then the trustee shall continue paying her the two-thirds interest from the trust fund created for that purpose."

As a whole the items in question seem to the Court clearly enough to express testator's general intention to give Charles Elvert a life interest in a part of his estate, with remainder to his children, together with a special solicitude for the wel-

fare of his crippled grand-daughter, Eva May, until the ultimate distribution of the fund. His son, Charles Elvert, was to receive a part of the income during life, and upon his death, the principal passed to his children; meanwhile, Eva May was to be supported. Until her majority, in any event, she was to receive two-thirds of the income; and then, in case she should still prove physically incapable of self-support, she was to continue to receive it. For how long a period? Manifestly, until her father's death; for to her majority and from her majority to her father's death testator had provided for her; and thenceforward no necessity would exist for such provision. The fund would then become payable to the remaindermen, of whom she was one. Instead of income, testator doubtless reasoned, she would then receive her share of the principal, and out of this, she could continue her own support. Thus both objects of his provision would be carried out. Charles Elvert would receive his income during life; Eva May would be supported and maintained until she received her share of the principal fund.

The construction suggested of the items in question, if not illegal, would seem forced to the Court, and convict the testator of an inconsistency. As a result, two-thirds of this share would have to be placed in trust for the benefit of Eva May for life, because she is an incurable cripple. Not only would the identity of the remaindermen then be made uncertain, but there would be no passing of the principal fund at the death of Charles Elvert, as directed by testator's will, to the former's children. Eva May is just as much one of these children as any of the others. How, then, can she, as one of them, be deprived of her share absolutely. To so deprive her, one would have to cut down by words of uncertain and indefinite meaning, an absolute estate already given to her, contrary to the rule, that a clear and direct bequest or devise will not be affected by a later clause of doubtful import: *Parker's Appeal*, 61 Pa. 478; *Sheetz's Appeal*, 82 Pa. 213; *Cheetham vs. Muhlenberg*, 133 Pa. 309. None of these difficulties is presented by the Court's construction; and, seeming the more fair and reasonable, it is adopted; and distribution will be made accordingly.

GRUBER'S ESTATE.

Wills—Legacy of Personal Property—Life Estate with Power of Consumption—Distribution of Residue.

Where, upon the death of a life tenant, there remains a residue of a fund given to him with power of consumption, the residue is distributable to the remaindermen.

Decedents' Estates—Contract to Adopt Child—Consideration.

Claimant asked for the distribution to her of the whole of the estate of decedent, basing her claim upon a contract made by her mother with the decedent when the claimant was a child, by the terms of which the decedent took the claimant into his family with the intention of raising her as his child, and agreed that claimant was to get everything he had at his death if she would stay with them until she was married. The claimant took decedent's name and lived in his family until her marriage. The relation of parent and child with her own mother was not severed. The accountant resisted the allowance of the claim on the ground that the contract was against public policy and therefore void. The evidence showed that claimant's mother had been deserted by her husband, and was in destitute circumstances, and that the contract was greatly to the benefit of the child. **Held:** that the contract was enforceable.

Contracts for Benefit of Third Party—Enforceability.

A contract is enforceable by the party for whose benefit it was made, although not a party to it.

In the Orphans' Court of Berks County.

Ira P. Rothermel for accountant.

William E. Fisher and John B. Stevens for claimants.

Opinion by Schaeffer, P. J., October 20, 1917.—The decedent died on the 13th day of May, 1916, intestate, unmarried and without issue, leaving to survive him as next of kin collateral heirs.

Several claims have been presented against the estate. One of them, in behalf of John William Hettinger, concerns a fund of \$331.15, which came to this decedent under the will of his wife, Hettie, who died January 19, 1913.

In her said will, she provided that "It is my will that if my husband survive me, then he shall have all I possess, to have and to hold the same as long as he lives, and to use as much of the same as he needs to support himself and also John William Hettinger . . . after my husband's death what is left thereof shall be placed in trust with a person . . . approved by the Orphans' Court, for the said John William Hettinger aforesaid. The said trustee so appointed shall invest the said money and pay the interest to the said John William Hettinger and as much as is necessary of the principal to support him.

If, however, the said John Hettinger should die then the said trustee shall hold the said money in his hands and pay the said interest to the mother of the said John Hettinger and the principal shall be paid in equal shares to the brothers and

sister of the said John Hettinger, if any, as soon as they have attained the age of twenty-one years."

The fund in question has been traced into the possession of this decedent, where it had remained until his death. Both the check representing payment, and his bank book are here. Following the death of Henrietta Gruber, Thomas J. Zerby, her executor, on June 27, 1914, delivered to this decedent a check for \$331.15, the amount of the fund claimed. Said check, as appears by decedent's bank book, was deposited to his credit in The First National Bank of Bernville, Pa., on June 27, 1914. The money has remained there ever since; and the Court knows of no reason why it should not now be subject to the further provisions of Henrietta Gruber's will. Tyson's Appeal, 191 Pa. 218, decides that where, upon the death of a life tenant, there remains a residue of a fund given to him with power of consumption, that residue shall be distributable to the remainder men. That is this case, and the claim consequently is allowed, and distribution will be made accordingly.

Gertrude Hettinger, also makes a claim for the whole balance in the account, after all the other debts are paid, based on an alleged contract made by her mother Isabella Schuler with the decedent some thirty years ago, when he promised to give his entire estate to the claimant upon his death, if the mother would give him and his wife the claimant, and permit her to live with them until she got married.

The testimony shows the following facts: Gertrude Hettinger, the claimant, who is now married to Adam Hettinger, and is thirty-four years of age, is the only daughter of Isabella Schuler. Mrs. Schuler had three children, the claimant and two sons. The husband of Mrs. Schuler deserted her and the children, when the claimant was two years of age, and left the family in destitute circumstances—the mother supporting herself and children out of wages earned in the neighborhood where they resided. While the mother was visiting a family near Klopp's Store in this county, where she was employed at various times, she met the decedent and his wife who were visiting there at the same time. It appears that during this visit, the decedent and his wife who knew claimant's family expressed the desire to Mrs. Schuler the mother, of having the claimant who was then about two and a half years of age, come and live in their family, saying, that they had no children and were anxious to adopt the claimant and rear her as their own child. The mother, at first, demurred, for she was unwilling to give her only daughter the claimant, to them. However, after much persuasion on the part of the Grubers the mother finally consented to let them have the claimant, upon their promise that the claimant was to get everything they had at the time of their death if she would stay with them until she

got married. The claimant remained with them ——— years up to the time of her marriage, and always went by the name of Gertrude "Gruber," while she lived in the decedent's family. The decedent on different occasions acknowledged his obligation under the arrangement and said that the claimant was to have everything he had. He repeated this statement just about two months before he died, when he expressed a longing to live in the home of the "child" (claimant) he raised, and said, "after my death it is any ways her's." The testimony, which is not contradicted, establishes the contract set up in this case, and shows that the claimant performed her part of it, and now asks for the fulfillment of the agreement on the part of this estate.

The accountant resists the allowance of this claim, on the ground that this contract was against public policy, and therefore void. In support of this contention he relies on the case of Enders, Appellant, vs. Enders, et al., Exrs., 164 Pa. 266, wherein our Supreme Court considered the force and validity of a contract such as is involved in this case. The facts in that case were as follows: Annie Enders, the plaintiff, was the daughter-in-law of the defendant William Enders. She was forced to leave her husband, the son of the defendant, on account of his ill-treatment and refusal to support her. She went to the home of her father who resided at Berkley, in this county, and lived there with her son who was two years of age and the only child. While she was staying with her father, the defendant and grandfather visited them, and after discussing the boy's future, and manifesting a great interest in him, he finally prevailed upon the mother to allow him to have the boy and educate him, the boy to make his home with him until he was of age, she to have the privilege of visiting her child when she desired, and to have him at her home whenever convenient, and he would give her \$20,000 and the boy \$10,000, when he came of age. The mother consented, and thereafter the home of the boy was with his grandfather, the mother and son visiting each other frequently. About November 25, 1891, soon after the boy came of age, the grandfather died, but he had not paid, nor had he made any provision, by will or otherwise, for payment of the \$20,000 to the mother, Annie Enders. Thereupon she brought suit against his executors, and the questions in the case were: 1. That there was no sufficient consideration to support the alleged contract. 2. That the contract, even if proven, was void because against public policy. The decision was that the consideration was sufficient, and that the contract was not against public policy.

The reasoning of the decision on the question of public policy was to the effect: That the contract contemplated no severance of the parental relation, and was wholly for the

benefit of the child, and to gratify the pride and affection of the grandfather; that "the tendency of such contracts, between grandparents of good character and ample estate, and parents in reduced circumstances, where parental solicitude and affection are not to be extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor of good morals."

In the case at bar, the parties to the contract were only distantly related, if at all, but were neighbors, so to speak, and knew each other for many years. The accountant contends, that the relationship existing between claimant and the decedent was not close enough or of such a character, as to take the case out of the rule established by a line of authorities, and particularly referred to in *Enders, Appellant vs. Enders, et al.*, *supra*, page 273, that a parent cannot bargain away for a consideration the custody and support of his child to a stranger.

It has repeatedly been held, that a contract should not be declared to be in contravention of public policy unless it is apparent that it contravenes some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety. The question whether or not a contract is against public policy must be determined by its purpose or tendency, and not by the fact that no harm results from it. In many jurisdictions it has also been held, that public policy forbids a parent to attempt by contract to shirk his responsibility for the support, education and training of his child, and that a contract having such an object in view will be held void.

There is no public statute in our state forbidding a parent from surrendering the custody of his child under all circumstances; and, in fact, our Legislature by statute has declared that a parent can consent to adoption of its child upon certain conditions. Since a contract such as the one here in question does not offend against a public statute, the next question that arises is, whether the facts constituting it, are of such a character, that they will forbid us from countenancing this agreement, because of its tendency to injure the public, and impair the good morals of the community. We do not think they are. This is not the case of a parent contracting for the relinquishment of her child for the purpose of relieving herself from those moral and legal duties which a parent owes to a child.

There is no testimony in this case to show that the relation of parent and child was severed, or that there was any intention on the part of the mother, to cast off all parental duty and obligation. The mother of the claimant in the case at bar, was very reluctant to part with her little girl, and it was only after contemplating her destitute circumstances and consider-

ing the advantages for a child in the home of the decedent, that she consented to let claimant live with them, until she got married. There was no self-seeking on the part of the mother—the mother did not receive a cent—when she entered into this contract; and her sole purpose was the welfare and comfort of her daughter. In addition it was only at the urgent solicitation of the decedent that she gave the girl, upon the condition that the latter was to receive the whole estate.

Considering the situation of the parties and their circumstances in life, we regard this contract as having been beneficial to all parties, and that it cannot be considered as injurious to the public or good morals. The mother made a beneficial arrangement for her child, and the decedent and his wife enjoyed her companionship and gratified their affections. In *Van Dyne vs. Vreeland*, 11 N. J. Eq. 371, *Hill vs. Gomme*, 1 Beavan, 541, and in *Neal's Executors vs. Gilmore*, 79 Pa. 427, cited with approval in *Enders, Appellant vs. Enders*, *Supra*, it was held that contracts by parents with strangers for relinquishment of the custody of a child were not void, "because of the special facts and on the ground that the contracts were for the welfare of the child." It has been intimated that this contract cannot be enforced because claimant was no party to it. She, however, was the party for whose benefit the contract was made. All the advantages of it were to accrue to her. The party for whose benefit the agreement is to be performed, and especially if any valuable portion has been rendered by him, has the legal right to enforce it: *Van Dyne vs. Vreeland*, *Supra*, 379. Moreover, it is too late for the personal representative of decedent who has accepted the performance of this contract on the part of the claimant, to raise the objection that he is not bound by it, because he could not enforce that performance if it had been refused.

We think this contract should be enforced, and therefore allow this claim for the balance in the account, less expenses and just debts.

WEBER'S ESTATE.**Wills—Construction—Bequest of Business by Testatrix.**

Testatrix provided by her will that certain factories owned by her should be operated by three of her sons, the "upper" factory to be in charge of her son Harry and the "lower" factory in charge of her sons James and Daniel; the profits of the factories to be equally divided among the three, who should, however, pay a certain sum each month to her other children as rental; that if Harry should decide to withdraw from the "firm" the other two sons should have the first right to purchase his share, at a price to be fixed by an appraisement; that the factory buildings should not be sold unless the three children mentioned, and all the others, declined to continue the business, in which event the executor was directed to sell the factories and divide the proceeds equally among the children.

A further provision in the will stipulated that all of the bills due the factories at the death of the testatrix should be used to pay the debts and the balance remaining should be divided among certain children and if the money should be insufficient to pay the debts the deficiency should be assumed by Harry, James and Daniel.

Harry, James and Daniel took over the operation of the factories, and subsequently the shares of James and Daniel were purchased by Harry; he thereupon expanded the business with his own capital and installed additional fixtures and conducted the business as his own.

Two of the heirs filed a petition in the Orphans' Court asking for an order upon Harry to account for the profits of the business and asked also for his removal from the executorship of the estate. **Held:** dismissing the petition, that under the terms of the will the business was given to Harry, James and Daniel, and that they were entitled to all profits; that Harry, having purchased the interests of his brothers, was entitled to operate the business as his own, being accountable only for the value of the machinery and merchandise in the factories at the time of the death of the testatrix.

In the Orphans' Court of Berks County.

Petition for removal of executor.

Cyrus G. Derr and Walter B. Freed for petitioners.

John B. Stevens contra.

Opinion by Schaeffer, P. J., November 3, 1917.—This is an application by Hattie M. and Mary A. Weber, the former a daughter of testatrix and the latter surviving widow of a deceased son, Daniel, for an order upon Harry C. Weber, executor, to account for the profits of a certain business now being conducted by him, and for his removal from the executorship and trusteeship of this estate.

Anna Weber, late of Reading, this county, died, testate, on May 25, 1905, having, by her last will and testament, provided, *inter alia*, as follows:

"I direct my hereinafter named executor to pay all my just debts and should a deficiency occur in my funeral, as hereinbefore stated, I direct the same shall be paid by my hereinafter named executor out of my estate. They shall collect all of the bills due the factories and with the proceeds and the factories money in the banks pay all the debts of the factories and should there not be sufficient money arising from the

collections of the bills and moneys in the banks, the deficiency shall be assumed by my sons Harry C. Weber, James A. Weber and Daniel Weber, and should there be a balance over after making the collections and the factories moneys in the banks and after paying the debts of the said factories, that balance shall be equally divided among my children to wit: Herman Weber, Walter Weber, Harry C. Weber, James A. Weber, Hattie M. Moyer, and Maude E. Weber share and share alike.

* * * * *

"Item: I give and bequeath to my daughters Hattie M. intermarried with Reuben E. Moyer, and Maude E. Weber all the moneys deposited in banks which is deposited in the name of Anna Weber; share and share alike.

* * * * *

"Item: I do hereby direct that my property at the corner of Twelfth and Chestnut streets shall be sold at public or private sale . . . and all the money arising from such sale shall be equally divided between my children Herman Weber, Walter Weber, Harry C. Weber, James A. Weber, Daniel Weber, Hattie M. Moyer and Maude E. Weber, share and share alike.

"Item: I direct that the factories shall be run as follows: The upper factory shall be in the charge of my son Harry C. Weber and the lower factory shall be in charge of my sons James A. Weber and Daniel Weber. The profits of the said factories shall be equally divided among the said three children, Harry C. Weber, James A. Weber, and Daniel Weber, who shall pay a rental sum to my sons Herman Weber and Walter Weber each the sum of twelve dollars per month, and to my daughter, Maude E. Weber, the sum of fifteen dollars per month until she shall marry, thereupon the said payment to my daughter Maude E. Weber shall cease. However, if at any time the said factories shall be idle for more than one month then the above mentioned rents shall not be paid during the time the factories are idle. My sons Harry C. Weber, James A. Weber and Daniel Weber shall each receive fifteen dollars per week for their labor out of the profits of the factories.

"I do hereby order and direct that the sum of fifteen dollars per week, as hereinbefore provided, shall be paid to my son Daniel Weber as long as he is connected with the factory or factories and not able to work in the said factory or factories on account of illness.

"I do hereby order and direct that my son Harry C. Weber shall have the sole management of the financial matters connected with the said factory or factories and the business thereof. All contracts to be approved of by him and

all moneys to be received and deposited by him and all checks and other obligations to be signed by him only. In case of the death of my son Harry C. Weber then the surviving sons running the factory or factories shall decide amongst themselves who shall assume the duties of my deceased son, Harry C. Weber. If at any time my son Harry C. Weber shall desire to withdraw from the firm, then my sons James A. Weber and Daniel Weber shall have the first right to purchase the share of my son Harry C. Weber, the amount to be determined by an honest appraisalment of three disinterested persons.

"However should any or either of my sons Harry C. Weber, James A. Weber or Daniel Weber die, then from the date of such death the share of the profits of such deceased son or sons shall be paid unto his or their widow or widows, and if there be no such widow or widows surviving and there be no children surviving, then such aforesaid share or shares of such deceased son or sons shall be paid unto his or their respective children as the case may be the foregoing is subject to the proviso that the aforesaid factory or factories are being run by my said mentioned sons as aforesaid or by any or either of them surviving as aforesaid and to continue as long as the factory or factories are run by the survivor or survivors of them, and also should it happen that any or either of my said three sons be not connected with the running or business of the said factory or factories at the time of his death or their death, then the aforesaid bequest of the share or profits shall not apply to the widow or children of such deceased son or sons dying not connected as aforesaid.

"If at any time my three sons, Harry C. Weber, James A. Weber and Daniel Weber, or the survivors or survivor of them decline to continue the manufacturing business, or my said three sons are deceased, it is my will that the factory or factories shall not be sold as long as any of my other sons wish to run the factory or factories, and if my sons Harry C. Weber, James A. Weber and Daniel Weber decline to run the factory or factories and if Herman Weber and Walter Weber or either of them wish to run the factory or factories, they shall pay a monthly rental sum of twelve dollars per month to each of my said sons, if living, or if dead, to their widows or children of such deceased sons or son as aforesaid, and to my daughter Maude E. Weber a rental sum of fifteen dollars per month in the manner and period of time heretofore provided. Should neither of my said sons desire to run the said factory or factories, I do hereby direct my hereinafter named executor to sell the said factory or factories either at public or private sale for the best price obtainable, and I do hereby authorize and empower my hereinafter named executor to sign, seal, execute and acknowledge all such deed or deeds

of conveyance as may be requisite and necessary for the granting and assuring the same to the purchaser or purchasers thereof in fee simple and the proceeds of said sale shall be equally divided among my children, Herman Weber, Walter Weber, Harry C. Weber, James A. Weber, Daniel Weber, Hattie M. Moyer and Maude E. Weber, share and share alike or their heirs share and share alike.

"All the rest and residue of my estate real, personal and mixed whatsoever and wheresoever the same shall be at the time of my decease, and not hereinbefore given and disposed of I give, devise and bequeath to my children, Herman Weber, Walter Weber, Harry C. Weber, James A. Weber, Daniel Weber, Hattie M. Moyer and Maude E. Weber, or their heirs share and share alike."

The petition, after reciting in substance that part of the will relating to the operation of the factories, alleges that at the death of testatrix, Harry C. Weber, executor, with his brothers, James and Daniel, took possession of the badge and box factories, under the terms of the will; that subsequently, having bought the interests of his two brothers, James and Daniel, the executor proceeded to expand said business by the purchase of another building adjoining and since made to connect with the original factory building, by the installation therein of additional machinery, and by the introduction of certain other lines of manufacture, and to inextricably blend the new with the original box and badge business; that he had contrived, by advertisement, his methods of banking and book-keeping, and by his general course of conduct, to have himself regarded sole owner of the business, thus making its patronage and good will his own; and that, having taken possession of this factory building and business as trustee and as such being accountable for their proper management and conduct, Harry Weber has pursued a course inimical to the interests of his mother's estate by designedly working to absorb the business and thus injure and prejudice the estate: and prays, therefore, for a decree, removing Harry C. Weber as executor of the estate, directing him to account for the profits of the business since his mother's death, and ordering the sale of the property by a trustee to be appointed for the purpose.

In his answer, Harry C. Weber, respondent, avers that at the death of his mother, as appears by the inventory on file, the machinery and merchandise in said factories were appraised at \$2,378.98, and the factory building at about \$1,800; that the only equipment in said factories for manufacturing purposes having been comprised of several hand presses and inadequate raw materials, and all the cash on hand and realized from book accounts having been divided among the legatees as directed by the will, he and his brothers, when they

took possession of the factories following his mother's death, were each obliged to invest in the business a working capital of \$500 to continue it; that he is now running the business, having purchased the shares of his brothers as alleged by the petition, and, under the provisions of the will, is entitled to all the profits of the business; and that the will, making it optional with him to continue the business, requires him to account as executor for said factories only when he has ceased to exercise his option. He denies that, in the conduct of his business bequeathed to him and his brothers by the will, he is wasting the property of the estate, or that, when the time to sell shall have arrived, he will be unable or unwilling to account for the proceeds of sale of said factories or their equivalent value as fixed by the inventory; that he is conducting his business as executor or trustee, instead of as owner entitled to all the profits, subject to the payment of rentals as directed by the will; and that he has acted in bad faith in this matter or has done anything to injure or prejudice the rights of the petitioners in this estate.

Considerable testimony has been submitted to support petitioners allegations; and while its tendency is towards showing that the respondent, Harry C. Weber, has run the business in question in his own, rather than in the interest of the estate, the Court does not understand that he denies this allegation, since he regards himself its sole owner. It will, probably, be sufficient to say that this testimony shows that he has in no wise prejudiced the interests of the estate, in the sense of having wasted or dissipated its assets. Rather the contrary seems to be true.

The questions raised by this proceeding, therefore, appear to be whether (1) when Harry C. Weber and his brothers took possession of this business, they became the owners of it in their own right and consequently entitled to all its profits; or (2) when they took possession of it they did so merely as trustees of the business for the benefit of both the estate and themselves; or to put the matter in another way, having come into possession of the business, were they individually entitled to all its profits, or should some of these profits have gone back into the factory for its enlargement and the improvement of its equipment, thus inuring to the benefit of the estate?

Depending as they do for answer upon an understanding of the rights and duties of the parties to this controversy, these questions seem to require as a preliminary the proper interpretation of the provisions of the will of testatrix. One would hardly say it is free from difficulty. Nevertheless, the true meaning and intention of testatrix when she directed the profits of the factories to be divided among her three sons is our problem and, therefore, we must try to ascertain as correctly

as we can her expressed intention as appears from the whole will. "In construing a will," says the Supreme Court in *Van Leer vs. Van Leer*, 221 Pa. 195, "the object of the Courts is to ascertain not the intention simply, but the expressed intention of the testator, i. e., the intention which the will itself, either expressly or by implication, declares; or (which is the same thing) the meaning of the words—the meaning, that is, which the words of the will, properly interpreted, convey;" and in *Wood vs. Schoen*, 216 Pa. 425, cited in *Seigworth's Estate*, 61 Sup. Ct. 235, 237, "the purpose of construing a will is to ascertain the intention of the testator, so that it may be carried out in the disposition which he has made of his property. Technical rules of construction should only be resorted to and applied in the interpretation of wills, when found to be necessary in determining the meaning of the instrument, so as to effectuate the purpose of the testator. If the language employed by him in disposing of his estate is plain and discloses his intention, the will interprets itself, and hence no rules of construction are necessary to aid in its interpretation. All mere technical rules of construction must give way to the plainly expressed intention of the testator, if that intention is lawful. It is a rule of common sense, as well as law not to attempt to construe that which needs no construction." It seems hardly necessary to cite more authority to support this well recognized rule. It has long been established that a testator's intent must be gathered from his words in the light of their plain and ordinary meaning: *Howe's Appeal*, 126 Pa. 233.

Applying these rules to the will before us, we find, on a careful reading of the instrument that the general scheme of testatrix in the disposition of her estate, was an immediate conversion and division among her children of her whole estate, except the factories now in question. She gave several special pecuniary legacies, among them, notably, all money in her private bank account to her daughters, Hattie M. and Maude E. Weber, the former one of these petitioners; she directed the sale of the Twelfth and Chestnut streets property, and divided the proceeds equally among all her children; she even directed—rather significant in the light of this controversy—the collection of all the bills due the business, and out of these collections the payment of its outstanding accounts, giving any remaining balance to all her children, but placing the burden of making up any deficiency in such collections upon her three sons, Harry, James and Daniel; and the residue of her estate she gave to all her children. There then remained only the factories.

With regard to these, her intention appears to have been to postpone their conversion long enough, at least, to enable

her sons to become well settled in the business; and to the Court, it seems, she made a distinction between her factories equipped for business, and the running business she contemplated should be carried on in them. This distinction appears fairly clear. She starts out, for example, by designating her factories, "Upper Factory" and "Lower Factory;" not as a factory building, or as the upper or the lower floor in the building. Now, a vacant building suitable for manufacturing purposes is far from being a factory; how much farther, therefore, are its bare floors from being factories? To become factories they must be equipped with power and machinery; and this building thus equipped would enable her sons to carry on the business, one of the objects uppermost in the mind of the testatrix.

But this distinction is emphasized in another way. In her mind, while closely related for commercial purposes, for purposes of division among her children, factories equipped for business and the business to be carried on in them were two entirely different things. As factories equipped she conceived them as belonging to all her children. They were to reap such benefit of ownership, for instance, as rentals, which were to be paid by those who occupied the factories to those who did not. True, some of the children not occupying the factories, for reasons mentioned or apparent, were to receive no rent. Hattie, married, was to receive none, and following her marriage, neither was Maude. Both, it will be remembered, in an earlier clause of the will are given their mother's private bank deposit. And these may have been the consideration that moved testatrix to exclude them from the rentals; but, in any event, having reserved the right to fix the rentals, she could also say who was to receive them. The fact remains that testatrix did recognize the right of her children to receive rent, and by that act, it seems to the Court, she also recognized them as the owners of the factories equipped for business. To this extent, at least, testatrix's intention seems fairly clear.

When, however, she came to the business to be run in the factories, she took a different view of this question of ownership. First of all, it is to be noted, that she did not fix it in any one definitely. She could not; for having stripped it of all capital and having placed upon certain of her sons the burden of making good any deficiency in assets to pay the outstanding accounts, she made the possibility of any business at all largely dependent upon individual effort and capital; and the ones who put forth the effort and furnished the capital were to have the benefit. Here again, for reasons not so difficult to fathom, testatrix shows a preference. Of her five sons, Harry, James and Daniel were to have first choice of running the business. Harry, testifying in these proceedings,

maintains that the choice of him was a reward for his faithfulness to the business from early childhood; and he may be right, for testatrix, in giving him almost absolute control of the business, palpably evidenced much confidence in him. However this may be, she did give Harry and his two brothers first opportunity to take and run the business. She also gave these three the privilege of buying each other out; and should any wish to take advantage of the privilege, she even provides the method of sale—by honest appraisement to determine the price. Honest appraisement of what? Certainly not of the factories equipped for business; for she quite clearly directs that those should remain unsold until all her sons should have declined to run the business. She therefore, must have meant an appraisement of the business. For at this point she is not talking about factories in the sense used before, but about the business to be run in the factories; and here again, though in another way, she fixes the ownership. She gave these three sons the right to sell their shares of the business to each other; and the right to sell, it seems to the Court, certainly presupposes ownership. Having taken away all its capital and made the continuance of the business largely dependent upon their individual efforts, testatrix properly conceived them owners of what they might build, and recognized them as owners in conceding them the right to sell their interests.

The fact that these three sons, under the will, could have disposed of their interests in this business to the other two, makes no difference. The important thing is that after Harry and his brothers took possession, their interest could be obtained by the remaining two sons only by purchase. Had the two bought, they would have simply stepped into the shoes of the three, with the latter's rights and obligations.

Now, to the Court it seems if the reasoning thus far is correct, it should lead to but one conclusion. To the owners of the business in question here there should inure certain benefits, just as certain benefits were to inure to the owners of the factories equipped for business. To those of the latter class who did not occupy the "factories" testatrix directed the payment of rent; to the former who ran the business, therefore, should go its profits. And that is precisely what testatrix has directed. To Harry C. Weber and his brothers she gave by her will the profits of the business which they might run and develop. Consequently, Hattie Weber, as one of the owners of the factories equipped, and her co-petitioner, Mary A. Weber, taking through a deceased owner, are interested in the factories equipped alone. Harry C. Weber, the respondent and survivor of those who ran the business, is the owner of the whole business and is entitled to all its profits.

To ascertain the value of the factories equipped for business, one must go back to the death of the testatrix. Except for any appreciation of the real estate, this value is fixed in the inventory filed. Anything above that represents merely profits, which, as said before, belong to the owner of the business. The fact that part of his profit went into additional equipment, to the mind of the Court, makes no material difference. For, if the Court's views are correct, he is to be regarded as occupying the position of tenant, and any fixtures installed by him for the benefit of his trade or business belong to him: *Robinson vs. Harrison*, 237 Pa. 613. The new equipment representing profits, belongs to him; the rest of it is the property of the estate.

The further result is that Harry C. Weber, having acquired this business as a purchaser and legatee of his mother, cannot be called upon as a trustee to file an account of his profits. He is not a trustee, but the owner of this business. No one else consequently has an interest in the profits. Moreover, until he declines to run the business or dies, no one can be obliged to sell the "factories." These are the terms of his mother's will, and unless it could be shown that as executor he has violated his duty or impaired the interests of the estate, the Court will not interfere. No such ground for interference has been shown; the contrary, as appears from the testimony, seeming to be the case.

The rule is discharged, and the petition is dismissed.

SNYDER vs. REICHART CLEANING & DYEING CO. et al.

Corporations—Receivers—Pending Suits.

A judicial proceeding instituted before the appointment of a receiver and pending at the time of his appointment does not abate, if the receiver makes no objection to its going on. It may, with his assent, be prosecuted for his benefit in the name of the original party, or he may apply to the Court to be made a party to it, and continue it himself as such. In one way or another he has a right to control it so long as it has not been carried to final decree.

Corporations—Fire Insurance—Renewal of Policies—Payment of Premium by President and Unauthorized Assignment to Himself.

Policies of insurance on the property of a corporation being about to expire, R, president of the corporation, renewed the policies in the name of the corporation, paid the premiums himself and, being a creditor of the corporation, had a clause attached to the policies by the insurance companies, making the loss payable to himself and his son, judgment note creditors, as their interests may appear. Subsequently a loss occurred and R. made settlement with the insurance companies, the money he received being less than the money owed him by the corporation. A stockholder and creditor filed a bill in equity against the corporation and R., asking that a receiver be

appointed; that the loss clause in favor of R. be declared null and void, and that R. be compelled to account to the receiver of the corporation for the insurance money collected. The Court appointed a receiver. Held: that R. could not be compelled to surrender the insurance money except upon re-payment to him of the whole amount due him from the corporation; but that he should file an account in order to determine whether there was any balance due the corporation after payment of its indebtedness to R.

In the Court of Common Pleas of Berks County: In Equity.

No. 1191 Equity Docket, 1917.

Bill for receiver and an account.

Randolph Stauffer for plaintiff.

Oliver M. Wolff for Reichart Cleaning & Dyeing Co.

Snyder, Zieber & Snyder and Ira P. Rothermel for Reichart et al.

Opinion by Endlich, P. J., November 5, 1917.—

I. FINDINGS OF FACT.

1.—The Reichart Cleaning & Dyeing Co. is a corporation of the State of Pennsylvania, located and doing business in this county. The amount of its stock, the par value of which is \$10 per share, is \$25,000, all of it issued and outstanding.

2.—Charles Reichart, defendant, has been and is the president of said company; Isaac Reichart, defendant, is his son; and Edward G. Snyder, plaintiff, is its treasurer; all of these persons being stockholders and creditors of the company. The debt due by the company to Charles Reichart is claimed to be approximately \$4,500, and that due Isaac Reichart approximately \$1,000, for part of which amounts these defendants hold judgment notes of the company.

3.—On or about June 20, 1914, Charles Reichart, while president of the company, with a view to protection of his and his son's claims against the company, caused to be renewed certain policies of insurance, amounting in the whole to \$7,000, on the plant of the Reichart Cleaning & Dyeing Co., originally issued to said company. The company not being in funds and the premiums overdue, he paid for the renewals out of his own pocket, and had them marked "Loss, if any, payable to Charles Reichart and Isaac Reichart, judgment creditors, as their interest may appear." This was done by him without the knowledge, authorization or consent of the board of directors of the Reichart Cleaning & Dyeing Co., and there was no subsequent ratification thereof by said board.

4.—On Sept. 29, 1914, the plant of the company was destroyed by fire, and the defendants, Charles Reichart and Isaac Reichart, in suits brought by them upon the policies in the

name of the company to their use, have collected about \$4,000 from certain of the insurance companies upon their policies referred to, by way of compromise of all but two of said suits. These settlements were made without authorization from the board of directors of the company, and the proceeds of them are retained by said defendants, Charles Reichart and Isaac Reichart.

5.—Charles Reichart received six payments of interest due the Reichart Cleaning & Dyeing Co. on bonds of the Reading Realty Owners, Inc., owned by the company, aggregating \$612. This money he declines to pay over to the treasurer of the company, claiming to have used it to pay bills due by the company.

6.—On March 26, 1917, plaintiff filed this bill (a) to have a receiver appointed for the company,—(b) to compel Charles Reichart and Isaac Reichart to account for and pay over to such receiver the sums mentioned in the foregoing findings, Nos. 4 and 5,—(c) to annul the clauses for payment of loss to defendants, Charles Reichart and Isaac Reichart,—(d) to restrain said defendants from settlement of the suits still pending,—and for general relief, etc. The bill was, in due course, taken pro confesso against the company on May 8, 1917. The answer of Charles Reichart and Isaac Reichart (disclaiming objection to the first and second prayers of the bill) was filed on Apr. 26, 1917, and the cause was called for trial and the evidence heard on May 28, 1917.

7.—In the meanwhile, the Reichart Cleaning & Dyeing Co. being concededly insolvent, a receiver was appointed by this Court on May 22, 1917, temporarily, and on June 11, 1917, permanently; and on Oct. 20, 1917, a rule was granted at his instance to show cause why he should not be made a party to this bill.

II. DISCUSSION.

The appointment of a receiver for a corporation works a suspension of its functions and authority over its property and effects, and operates as an injunction restraining its agents and officers from intermeddling with its affairs in any way. It does not, however, follow that a judicial proceeding instituted before and pending at the time of the appointment of the receiver must abate by reason of the same, if the receiver makes no objection to its going on. On the contrary, it may with his assent be prosecuted for his benefit in the name of the original party, or he may apply to the Court to be made a party to it and continue it himself as such. In one way or another he has the right of controlling it so long as it has not been carried to final decree. All this was pointed out, with the citation of pertinent authorities, in the case of the *Petition of the Prizer-Painter Stove & Heater Co.*, 2 Berks Co. L. J.

345, at p. 348. The present proceeding is brought for the benefit of the corporation, its creditors and stockholders, by one who is the treasurer of it, a stockholder and a creditor. On Oct. 20, a rule was granted at the instance of the receiver to show cause why he should not be made a party. Under the principle above stated, the absence of the receiver as a party and the pendency of this rule do not forbid our further dealing with the cause as it is now before us.

The answer of Charles Reichart and Isaac Reichart expressly disclaims any objection to the second as well as to the first prayer of the plaintiff's bill asking for an accounting by those defendants and payment over to the receiver of moneys that may be found in their hands due to the company. Hence the question arising is whether Charles Reichart and Isaac Reichart are entitled to hold the money they collected upon the insurance policies marked payable to them as stated in the findings of fact, to the extent that it may be needed to reimburse them for lawful demands on their part against the company,—or whether they are to be required to hand that money over to the receiver. In support of his contention the plaintiff invokes the doctrine of *Gravemeyer vs. Ins. Co.*, 62 Pa. 340, 342, reasserted in *Light vs. Ins. Co.*, 169 Pa. 310, denying an insurable interest to a mere judgment creditor. In a contest between the Reicharts and the insurance companies involving the right of the former to recover against the latter, this principle might be controlling. But it is clear from the decision in the last cited case that even as between such parties the insurance company may waive the objection of want of insurable interest or become estopped from asserting it, and that the objection itself, therefore, is one which third parties cannot set up. It follows that the principle referred to is inapplicable in this case.

In so far as it is a fact that the Reicharts, having advanced money for the use of the company, have partly reimbursed themselves out of the proceeds of insurance paid for by them upon the corporation's property, there would seem to be no rule in law or morals that would require them to hand over the money to the receiver. In *Kendall vs. Klapperthal Co.*, 202 Pa. 596, at pp. 607-8, it was said by this Court (the decision being affirmed by the Supreme upon the opinion of the Common Pleas) as follows:

"The rule is that if directors of a corporation supply the latter with money to meet its legitimate needs and the money so furnished is properly used in carrying on the corporate business, they are entitled to recover from the company the value of the money so supplied and used, not upon the basis of any actual contract, but of a duty which the law imposes, for reasons of justice, to make fair compensation for what has been properly received and applied: 1 *Morawetz Priv. Corp.* sec 526;

3 Thomp. Corp. sec. 4069." And "where a director of a corporation was also its creditor and under circumstances making him chargeable with constructive fraud and by proceedings voidable upon that ground got possession of property of the corporation, he would not be compelled to surrender it except upon condition that he be made whole for the amount honestly owing him."

It is needless to point out how much less a court of equity would undertake to compel persons in the situation of these defendants to surrender what they have obtained except upon similar conditions, which, of course, it would be idle to impose because impossible to perform.

Neither can it be accurately asserted that Charles Reichart in obtaining the insurance acted as president of the company for the company. He ought perhaps rather to be regarded as having acted in his capacity of creditor and in his own right as such; and it is a maxim of our law that when different rights meet in the same person, they are to be treated as if they were in different persons: *Ross vs. Barclay*, 18 Pa. 179, 184. But in view of the admission in the answer of the propriety of the prayer for an accounting by Charles Reichart and Isaac Reichart, it must be considered that as to any excess over what was needed to reimburse them that prayer is to be sustained on the theory that Charles Reichart's action was affected by his character as president of the company.

The necessary conclusion seems to be that the prayers of the bill must for the present be refused, except in so far as they are for the appointment (already made) of a receiver, etc., and for the rendition of an account by Charles Reichart and Isaac Reichart of moneys received by them or either of them for defendant company or by virtue of any claim or demand based upon the rights of defendant company, and payment over to the receiver of such moneys found to be in their hands or in the hands of either of them.

III. CONCLUSIONS.

A—As between the corporation on the one hand and Charles Reichart and Isaac Reichart on the other, there was nothing unlawful or unfair in the latter's procuring the insurance payable to them in case of loss upon the company's property, and their collection of part of said insurance after the destruction of the property imposes upon them no liability to hand over to the receiver anything not in excess of their legitimate claims against the company.

B—Equity will not compel Charles Reichart and Isaac Reichart to surrender what they have thus obtained so far as it may be needed for reimbursement for what they advanced to or laid out for the benefit of the company, except upon condition of the satisfaction of their lawful demands; and the

company being insolvent and the performance of such condition therefore impossible, it cannot be reasonably imposed.

C—As to any balance beyond what is needed for defendants Charles Reichart and Isaac Reichart's reimbursement, and for the purpose of ascertaining whether there is any such balance, said defendants should be held to an accounting of moneys received by them, and moneys advanced or paid out by them, for the benefit of the company.

D—Excepting the prayers for the appointment of a receiver and an accounting as above indicated, the prayers of plaintiff's bill are for the time being to be refused.

And now, Nov. 5, 1917, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

STAAB, et al. vs. READING SCHOOL DISTRICT, et al.

Public Playgrounds—Nuisance—Injunction.

An injunction will not be granted to restrain the maintenance of a public playground in a built-up section of a city unless the evidence shows that it constitutes a nuisance.

"To hold the injunction prayed for grantable upon the facts of this case, would be tantamount to declaring the maintenance and operation of playgrounds impossible within the built-up limits of a city, and, if sustained, would eventually wipe them out. Such a result, deplorable from many standpoints, cannot be regarded as consistent with public interest and recent legislation or as demanded by the rights of private property owners."

In the Court of Common Pleas of Berks Co.: In Equity.

No. 1174 Equity Docket, 1916.

Exceptions to decision.

W. B. Bechtel for plaintiffs.

Wellington M. Bertolet for the Reading Playground Association.

Earle I. Koch for the Reading School District.

Opinion by Endlich, P. J., November 5, 1917.—The decision in this case was filed June 23, 1917, and is reported in 9 Berks Co. L. J. 173. The plaintiffs have taken a number of exceptions to the refusal of requests for findings submitted by them, as well as to certain findings and conclusions stated in the decision and to the decree indicated in the same. When the case was called for hearing upon the exceptions, nothing was advanced in the way of

argument in their support beyond the statement that plaintiffs stood upon what had been urged in their behalf previously to the decision excepted to. It was, indeed, asserted by plaintiffs' counsel that during the past summer, when the playground was open, plaintiffs were compelled to rent another house and remove the family into it on account of Mrs. Staab's condition and in order to secure quiet. On the other hand it was declared on behalf of defendants, and not contradicted, that during the same period there was no complaint by any one of annoyance resulting from the operation of the playground here in question. And there has certainly been no renewed application to the Court for relief because of excessive noise, etc., as there might have been, under the decision, had there been occasion for such application.

A careful review of the decision excepted to has suggested no need of its modification in the statements of fact or the disposition of the plaintiffs' requests or the conclusions of law. The truth is that, to hold the injunction prayed for grantable upon the facts of this case, would be tantamount to declaring the maintenance and operation of playgrounds impossible within the built-up limits of a city, and, if sustained, would eventually wipe them out. Such a result, deplorable from many standpoints, cannot be regarded as consistent with public interest and recent legislation or as demanded by the rights of private property owners. "The soundness of a principle," says Judge Sharswood, in *Mayer vs. Walter*, 64 Pa. 283, 286, "is often best tested by its practical working."

And now, Nov. 5, 1917, it is ordered that the exceptions filed to the decision of June 23, 1917, in the above-entitled case be dismissed, and counsel may prepare and submit the proper decree in accordance with the said decision, sec. reg.

QUINTER vs. QUINTER.

Practice C. P.—Jury Trial—Failure to Except to Charge of Court—Subsequent Allowance of Exception by Court—Act 11 May, 1911, Sec. 2, P. L. 279.

The Court, in the exercise of its discretion under Sec. 2, Act 11 May, 1911, P. L. 279, will, in a proper case, allow an exception to the charge of the Court even after verdict; though, no exception having been asked for at the trial, the exception entered subsequently involves no certification that there was such a request, as in the case of exceptions generally.

Same—Statutes—Interpretation—Punctuation.

Punctuation is not a controlling part of any enactment, yet it has been repeatedly held that it may be looked at as some indication of

meaning. It is probably safer in the interpretation of a statute like this to adhere to the exact language used, as punctuated, especially where the right thereby given is the broader right and makes in favor of the possibility of a review by the appellate courts of the action at nisi prius.

In the Court of Common Pleas of Berks County.

No. 34 January Term, 1916.

Rule for exception to charge of Court.

Walter S. Young, Wm. J. Rourke and W. B. Bechtel for defendant and rule.

Henry S. Green and Lee Friday for plaintiff.

Opinion by Endlich, P. J., November 5, 1917.—As mentioned in the decision discharging the rule for a new trial in this case: 9 Berks Co. L. J. 184, there was no exception taken or asked for to the charge of the Court at the time when it was delivered. After the refusal of a retrial, defendant moved that an exception be noted in her favor to the charge, and this rule was granted to show cause why it should not be done. The allegation of the petition that a request for an exception was addressed to the stenographer in the hearing of the Court was denied by the answer filed to the rule, and, incorrect in point of fact, was on the argument distinctly abandoned by defendant's counsel. Nevertheless it is insisted that the Court has a discretion still to grant the exception under sec. 2, Act 11 May 1911, P. L. 279 (unaffected, for present purposes, by the amendatory Act 5 June 1913, P. L. 421). It was so held in Allison vs. Water Wheel Co., 27 York 203, and apparently so considered in Com. vs. Duffy, 49 Pa. Super. Ct. 344, and there seem to be no authoritative decisions to the contrary. The section in question provides as follows:—

"Exceptions may be taken, without allowance by the trial judge, to any part or all of the charge, or to the answers to points, for any reason that may be alleged regarding the same in the hearing of the Court, before the jury retires to consider its verdict, or, thereafter, by leave of the Court; and they shall be thereupon noted by the official stenographer"

It will be observed that this language can be read in two ways. Read strictly according to its punctuation in the pamphlet laws, it would appear that the requirement of a request for an exception in the hearing of the Court applies only where it is made before the jury retires and where there is no allowance of the exception by the Court; and that it has no reference to the noting of an exception after the retirement of the jury and by leave of the Court. Disre-

garding the punctuation, or inserting a comma between the words "same" and "in," the meaning of the clause would seem to be that, whether asked before or after the retirement of the jury, in any event there must be a request for an exception made in the hearing of the Court. In other words, upon the strict wording of the statute, including its punctuation, the "leave of the Court" to enter an exception after the jury's retirement would appear not to depend in any degree upon the exception having been asked for and the reasons stated before its retirement in the hearing of the Court. Whilst punctuation is not a controlling part of any enactment: *Hammock vs. Loan Co.*, 105 U. S. 77; *Gyger's Est.*, 65 Pa. 311, 312; *Com. vs. Shopp*, 1 Woodw. 123, 129, yet it has been repeatedly held that it may be looked at as some indication of meaning: See *U. S. vs. Three R. R. Cars*, 1 Abb. U. S. 196; *Albright vs. Payne*, 43 Ohio 8; *Squires' Case*, 12 Abb. Pr. (N. Y.) 38. Much may perhaps be said in favor of holding to the view that it was intended to make the request for an exception in the hearing of the Court indispensable in order to justify the latter in subsequently allowing an exception. But on the other hand a good deal may be said on the other side; and there may be valid reasons for the distinction made by the statute in this respect between exceptions taken without allowance by the Court and those entered by its leave. At all events it is probably safer, in the interpretation of a statute like this, to adhere to the exact language used, as punctuated, especially where the right thereby given is the broader right and makes in favor of the possibility of a review by the appellate courts of the action at nisi prius. It is very apparent that an exception entered by leave of the Court under the enactment referred to is different from an exception as heretofore understood. It being presupposed that no exception was asked for at the trial, the exception entered subsequently under the Act of 1911 involves, of course, no certification that there was such a request, as in the case of exceptions generally: See *Penna. R. R. Co. vs. Reading*, 7 Berks Co. L. J. 147, 24 Distr. R. 855, and cases there cited.

Our conclusion is that we ought to hold that the power to permit an exception at this time is discretionary, and that that power should be exercised, unless it involves palpable injustice to the other party. That is not clear in this instance. There has been considerable delay on the defendant's part in moving for the exception; but it does not appear that any injury or inconvenience has resulted or is likely to result to the plaintiff. Even had an exception to the charge been taken and noted at the trial, the final hearing and disposition of the cause on appeal would not, in the regular

course of procedure, have been possible any sooner than it is now.

The rule to show cause is made absolute, and the stenographer is directed to note an exception in favor of the defendant to the charge of the Court.

**MEINIG vs. INTERNATIONAL MONEY MACHINE
CO., et al. (No. 2).**

In the Court of Common Pleas of Berks County: In Equity.

No. 1182 Equity Docket, 1916.

Exceptions to decision.

John B. Stevens and W. B. Bechtel for defendants and exceptions.

C. H. Ruhl and Rothermel & Mauger for plaintiffs.

Opinion by Endlich, P. J., November 5, 1917.—The decision in this case, favorable to plaintiff, was filed Aug. 25, 1917. (10 Berks Co. L. J. 33.) The defendants have taken a number of exceptions to findings of fact and conclusions, as well as to the decree indicated in the decision. At the argument of these exceptions defendants' counsel dwelt exclusively upon the contention that the bill could not be maintained because of the lack of previous formal notice of rescission and offer to return the stock involved in the transaction sought to be annulled,—invoking the same principle which was mainly relied on at the former hearing of the case, and to the authorities upon which, in the line of those cited by defendants' counsel, may be added the very recent one of *Wright vs. Leather Co.*, 257 Pa. 552. This principle was discussed and the line of cases referred to distinguished in the decision excepted to. In the absence of any new suggestion concerning its application and force in the present case, there seems to be no call for a rediscussion of it nor for a modification of the views heretofore expressed with reference to it. The remaining exceptions require no comment.

And now, Nov. 5, 1917, it is ordered that the exceptions filed to the decision of Aug. 25, 1917, in the above-entitled case be dismissed, and counsel may prepare and submit the proper decree in accordance with the said decision, sec. reg.

**O'REILLY, et al. vs. READING TRUST CO., Trustee,
et al. (No. 2).****Contracts—Fraud—Undue Influence.**

Business dealings between parents and children and other near relatives are not per se fraudulent, but must be treated as are dealings between ordinary debtors and creditors, and where the bona fides of their transaction is attacked, the fraud alleged must be clearly proved. Where, however, that which invalidates the transaction is clearly proved (and the undue exercise of influence springing from the confidential relation is practically indistinguishable from fraud) that rule is obviously satisfied.

In the Court of Common Pleas of Berks County: In Equity.

No. 1176 Equity Docket, 1916.

Exceptions to amended conclusions. (Reported in 10 Berks Co. L. J., 39).

Isaac Hiester for defendant and exceptions.

Elwood H. Deysher for plaintiff.

Opinion by Endlich, P. J., November 12, 1917.—Upon the amendment of the conclusions originally filed in this case, a number of additional exceptions were taken by the defendants. The theory upon which they proceed is the same as that maintained by defendants from the beginning of this litigation and advanced in the successive arguments that have taken place during its progress. A careful reconsideration has not led to the conviction that in any important aspect the views heretofore expressed by the Court should be modified or changed.

Recurring to the matter of the disputed competency of John F. O'Reilly's daughters to testify, it may be that defendants' admission of plaintiffs' right to set aside the Catharine Cecelia O'Reilly trust was understood in a sense more sweeping than that which was intended by counsel. In truth, however, it is of no controlling significance whether that right be admitted or not. Both the Patrick O'Reilly fund and the Catharine Cecelia O'Reilly fund passed to the trustees under the will of Catharine Cecelia O'Reilly, and not by any act of John F. O'Reilly. In the latter fund he never had anything but the life estate the will of Catharine Cecelia O'Reilly gave him. And concerning his relation to the Patrick O'Reilly fund after the assignment of his interest to Catharine Cecelia O'Reilly in 1889, it may be noted that that assignment describes itself as an "absolute conveyance and transfer" of John F. O'Reilly's interest in Patrick O'Reilly's estate, with provision for an income to John F. O'Reilly during his life, and with further provisions thereafter for his widow and children. The agreement of 1897 is a reaffirmance

of the agreement of 1889, embracing in addition the Catharine Cecelia O'Reilly trust fund, and as to both qualifying some of the previous directions of that agreement and of the will of Catharine Cecelia O'Reilly touching the ulterior destination of the funds, but neither creating in, nor passing from, John F. O'Reilly any interest of his capable of surviving him, or represented by the defendants upon this record. Thus, in the absence of any admission such as above spoken of, the question of the competency of the daughters of John F. O'Reilly to testify in this case is to be judged of on the same footing with respect to both funds; and much of what has been said with reference to the Patrick O'Reilly fund on that subject applies, *mutatis mutandis*, when we come to the Catharine Cecelia O'Reilly fund.

It is not considered necessary to decide, for the purposes of this case, whether John F. O'Reilly had the power to revoke the trust declared by the assignment of 1889, the relinquishment of such power being alleged to constitute the consideration for the so-called compromise of 1897. Whether he had or not, if, as contended by defendants, there was a compromise freely and validly entered into, the doctrine of *Fink vs. Bank*, 178 Pa. 154, 170, might apply, that the sufficiency of the consideration for a compromise is not determined by the soundness of the original claim of either party. If, on the other hand, the so-called compromise was brought about by unfair means, the consideration could not save it, and then again, whether or not he had the power to revoke the trust is not a decisive question. It is undoubtedly true, as laid down in *Reehling vs. Byers*, 94 Pa. 316, 323; *Brown vs. McCormick*, 135 id. 434, 437; *Kitchen vs. McCloskey*, 150 id. 376, 385; *Coleman's Est.*, 193 id. 605, 612, that business dealings between parents and children and other near relatives are not *per se* fraudulent, but must be treated as are dealings between ordinary debtors and creditors, and where the bona fides of their transaction is attacked the fraud alleged must be clearly proved. Where, however, that which invalidates the transaction is clearly proved, (and the undue exercise of influence springing from the confidential relation is practically indistinguishable from fraud: *Boyd vs. Boyd*, 66 Pa. 283, 293; *Caughey vs. Bridenbaugh*, 208 id. 414, 423), that rule is obviously satisfied.

We are of the opinion that the decision in this case should be as heretofore indicated, and accordingly—

It is ordered that the exceptions be dismissed, and that counsel may prepare and submit the proper decree, *sec. reg.*

STEFFY vs. STEFFY.**Divorce—Desertion—Non-Support.**

A wife asked for a divorce on the ground of desertion. The testimony showed that it was she who left her husband. She testified that the reason for leaving him was his failure to support her and because he had told her to go. It appeared that during the two years of their married life, the respondent was in the habit of telling her to leave him. **Held:** that the libel should be dismissed.

Divorce—Desertion—Evidence—Non-Support.

A husband's failure to support his wife is not itself a desertion within the meaning of the divorce law; neither does an allowance made in a proceeding for non-support in the Quarter Sessions, standing alone, establish such desertion.

In the Court of Common Pleas of Berks County.

No. 48 August Term, 1917.

Divorce.

W. E. Sharman for libellant.

Robert Grey Bushong, Master.

Opinion by Endlich, P. J., November 12, 1917.—The libel in this case charges the respondent with desertion and adultery. In order to warrant a decree of divorce, one or both of these grounds must be proved as averred: *Wilck vs. Wilck*, 1 Berks Co. L. J. 3, and cases there cited. The learned Master in his report negatives both of them and recommends the dismissal of the libel with costs. The libellant asks for a decree notwithstanding the decision of the Master. A searching perusal of the testimony returned by him with his report leads to the conclusion that the application cannot properly be granted. So far as the charge of adultery is concerned, there is no evidence whatever which would justify an affirmative finding. When it comes to the allegation of desertion, it must be borne in mind that a failure to support is not itself a desertion within the meaning of the divorce law: See *Ingersoll vs. Ingersoll*, 49 Pa. 249, 251. Neither does an allowance made in a proceeding for non-support in the Quarter Sessions, standing alone, establish such desertion: *Carey vs. Carey*, 25 Pa. Super. Ct. 223. It was the libellant who left the respondent in this case; and according to the finding of the Master, borne out by the testimony, her reason for leaving was a failure on the part of the respondent to support her. When asked by her counsel, "Why did you leave?" her answer was, "He didn't provide." She says later on that he told her to go and that she left because she had nothing to eat and was told to go. But it appears from her own evidence that during the two years or a trifle more of their married life the respondent was in the habit of telling her to leave him, and that she was probably

sufficiently accustomed to such remarks to attach little or no significance to them. Practically her testimony stands alone in this case, brief and meagre though it is. Her two witnesses, one her sister, the other her mother, add nothing material to her deposition. Besides, the Master had the libellant and her witnesses before him on the stand and had a better opportunity than we have of judging of their credibility. The case of LeGrand vs. LeGrand, 24 Distr. R. 244, relied on by the libellant's counsel, has some features in common with this case, but exhibits other important circumstances here lacking which differentiate the two and make the case cited a very much stronger one for the libellant than this one is. To grant the divorce here prayed for upon the testimony submitted would be to give the latter an effect which it seems clearly not entitled to.

The report and recommendation of the Master are approved, and the libel is dismissed at the costs of the libellant.

KIRBY'S ESTATE.

Decedents' Estates—Wills—Partial Intestacy—Widow's Claim Under Intestate Laws—Act 1 April, 1909, P. L. 87.

Testator devised to his widow a life estate in the whole of his estate, real and personal, but failed to make disposition of a portion of his personal estate after her death, there being therefore a partial intestacy. Testator left no issue, and the widow, in addition to the life estate given her by the will, claimed under the intestate laws the \$5,000 given by the Act of 1909, and one-half of the rest of the personal property absolutely. **Held:** that the Act of 1909 has always been regarded as part of the intestate laws, and applies whether there is a total or partial intestacy; that the widow's rights at law having vested at testator's death, she, being also the life tenant, is presently entitled to the distribution asked for.

In the Orphans' Court of Berks County.

Widow's claim for exemption under Act of 1909.

Snyder, Zieber & Snyder for accountant.

Opinion by Schaeffer, P. J., November 17, 1917.—The decedent died on the 1st day of September, 1916, testate, married and without issue, leaving to survive him a widow, Mary M. Kirby, and having, by his last will and testament, disposed of that part of his estate embraced in the account as follows:

"Second. I give, devise and bequeath to my beloved wife Mary, all my estate, real, personal and mixed of whatsoever kind and wheresoever situate, to have and to hold the same and to receive and enjoy the rents, issues, income and

profits therefrom for and during the term of her natural life, and at and upon her decease I give and devise and bequeath the same as follows, that is to say:

"Third. At and upon the decease of my said wife Mary, I give and devise unto Gordon Miller, son of my brother-in-law Edward Y. Miller, my farm No. 1 which I inherited from my grandfather, situate in Maiden creek Township, Berks County, to have and to hold the said farm and tract of woodland for and during the term of his natural life,

"Fourth. At and upon the decease of my said wife Mary, I give and devise to Gordon Miller, son of my brother-in-law Edward Y. Miller, my farm No. 2 which I inherited from my uncle, Solomon Kirby, situate partly in Maiden creek and partly in Richmond Township, Berks County, Pennsylvania, and also a certain tract of woodland situate partly in Ruscombmanor and partly in Richmond Township, to have and to hold the said farm and tract of woodland for and during the term of his natural life,

"Fifth. At and upon the decease of my said wife Mary, I give, devise and bequeath to Gordon Miller, son of my brother-in-law Edward Y. Miller, my homestead which I now occupy, situate partly in Maiden creek and partly in Richmond Townships, adjoining the above named farms Nos. 1 and 2, containing fifteen acres, more or less, together with all and singular the furniture and household goods therein, he, the said Gordon Miller, to have and to hold the said homestead and tract of land and furniture and household goods therein for and during the term of his natural life and to keep the same in the same order and report and without diminution as I kept it during my lifetime, and at and upon his decease I give, devise and bequeath the said homestead and tract of land and furniture and household goods therein as above mentioned to the children of the said Gordon Miller, in equal shares, the issue of any deceased child or children to take the same share as their parent would if living; but should the said Gordon Miller, die without any issue living at the time of his decease, then I give, devise and bequeath the said homestead and tract of land and furniture and household goods to his nearest blood relations living at the time of his decease, share and share alike. I order and direct that the two large clocks and pictures shall remain in the house and descend with the real estate devised in this paragraph."

The account contains the proceeds of personal estate, principal and income. Of principal, the balance for distribution is \$6,777.10, and of income, which has accrued since

testator's death, \$155.29. The funds will be distributed separately.

Included in the principal balance are the furniture and household goods in the homestead, situate partly in Maiden-creek and partly in Richmond Townships, valued, as appears by the inventory, at \$219.25.

With regard to the distribution of the balance, which is personal, it appears by the will that there is a partial intestacy. Having given the whole of his estate to his widow for life, which included all his real estate, testator failed to make a disposition over of the major portion of his personalty. This portion embraces all the personal estate, except the household effects in the homestead, appraised at \$219.25. In these circumstances, Mary M. Kirby, the widow, has elected to take, not only by virtue of her life estate in both the real and personal property under the will, but also her interest in the personal estate under the intestate laws.

That she is entitled to immediate distribution of whatever interest she has in the fund under the law, is decided by Freeman's Estate, 227 Pa. 154, where it is said that such interest vested in her immediately at the death of testator; and that, consequently, she can, if she so desires, have it set aside for her absolutely.

She, therefore, asks out of the principal here, first, for distribution to her for life of the homestead furniture and household goods, appraised at \$219.25, as to which there is no intestacy. What remains constitutes that estate as to which there is an intestacy after her death; and of this—testator having left no issue—she asks that there be distributed to her \$5,000.00, previously appraised to her under the provisions of the Act of 1909; and of the balance, one-half to her for life, under the will, and the remaining half to her absolutely, under the intestate laws. She also asks for all the income, which has accrued since testator's death. Thus, the question naturally arises, is the widow, in view of her acceptance under the will of her life estate in all the real estate, also entitled to take her rights at law in the personal estate and a life estate in the remaining personalty? In other words, is she in addition to all her other rights entitled to take \$5,000.00 under the Act of 1909?

The Act of 1833 provides for the descent and distribution of real and personal estate, after payment of debts, "which shall not have been disposed of by will." Of such of her husband's estate as remained undisposed of by will, where there is no issue, that act gave to the widow one-half of his real estate for life and one-half of his personal estate absolutely. In the distribution of estates ever since that provision has been invariably carried out with respect to widows wherever there has been an intestacy, in whole

or in part. The Act of 1909 in nowise narrowed or restricted the estate out of which she is to take. Following the language of the prior act, it also designated the real and personal estate she is entitled to as that "which shall not have been disposed of by will." And of that, where there is no issue, it simply gave her more than the prior act—"real or personal estate, or both," to the aggregate value of \$5,000.00. In anything above that, the Act of 1909 gave her the same proportions as those given her by the Act of 1833.

Both acts relate to the intestate laws of Pennsylvania. Ever since its passage, the Act of 1909 has been regarded part of the intestate laws of the Commonwealth: Guenthoer's Estate, 235 Pa., 67; the supreme court there saying, moreover, that the act "dealt with and included estates which were taken by widows by virtue of the intestate laws of the Commonwealth, whether there was a total or partial intestacy." That fixes the widow's rights in the case of partial intestacy. It was followed in Roger's Estate, 21 D. R. 1006, where testator disposed of his real estate without mentioning his personal estate at all, and the court cited Guenthoer's Estate as authority for distributing to the widow \$5,000.00 out of the personalty under the Act of 1909. Between Roger's Estate and this one the only difference is the intervening life estate of the widow here. But that difference is immaterial. For her rights at law having vested at testator's death, the widow, being also the life tenant, can, if she so desires, have them set apart to her immediately: Freeman's Estate, supra. That she has elected to do.

Under the authorities, therefore, the court thinks the widow is entitled to the distribution asked for; and it will accordingly be made to her.

Distribution of the personalty directly to her for life, will be made on condition that she furnish security, to be approved by the court, for the protection of the remainder interests: Kemerer's Estate, 251 Pa., 282.

DAVIDHEISER'S ESTATE.

Wills—Legacies—Vested or Contingent.

Testator devised all his real and personal property to his wife for life. After her death the executor was to convert the entire estate into money, to be distributed as follows: "After the whole of my estate has been converted into money then I give and devise the same to be equally divided between my four children, Sarah Amanda, Anna, Elmer and George." Sarah Amanda and Anna died before the widow. **Held:** that their shares under the will vested at the death of testator, and were distributable to their personal representatives, the power of sale in the will having worked a conversion.

In the Orphans' Court of Berks County.

S. M. Meredith and Lee Friday for claimants.

Rothermel & Mauger for accountant.

Opinion by Schaeffer, P. J., November 17, 1917.—The decedent died on February 4th, 1870, testate, leaving to survive him his widow Elizabeth, and four children, named in his will, to wit: (1) Sarah Amanda, (2) Anna, (3) Elmer and (4) George.

Sarah Amanda, a daughter, died in December, 1909, intestate and was survived by her husband Samuel Shirey, and three children, Rosa Hartman, Minnie Kline and Elizabeth Dunkelberger. Anna, a daughter, died in October, 1913, and was survived by her husband, Wellington Shirey.

The widow, who had a life interest in the whole estate of the decedent, died March 8th, 1915.

The provisions of the will of the decedent governing the disposition of his estate are as follows:

"Second. I give and devise to my beloved wife Elizabeth all my real estate and personal property of whatsoever kind and nature the same may be and wheresoever situated, during her life time, she to educate, maintain and raise my four children, viz: my two daughters Sarah Amanda, and Anna, and by two sons Elmer and George until they arrive at the age of twenty-one years, in case of the death of my wife Elizabeth before any of my children arrives at the age of twenty-one years, or in case of her death at any time thereafter, then in either events, I order and direct my Executor hereinafter named to dispose of all my real estate and personal property at either public or private sale for the best price that can be obtained for the same, hereby authorizing and empowering my Executor to make deed or deeds to the purchaser of my real estate, the same as I myself could do if living.

"Third. After the whole of my estate has been converted into money then I give and devise the same to be equally divided between my four children, Sarah Amanda, Anna, Elmer and George, and appoint my brother, John Davidheiser, to be the guardian of my two daughters, Sarah Amanda and Anna, and my brother, Jacob Davidheiser, to be the guardian of my two sons, Elmer and George."

The fund for distribution in this account is the proceeds of the sale of the real estate converted after the death of the widow, as directed by the will; and the balance for distribution is shown to be \$4,807.06.

The two daughters, Sarah Amanda and Anna, having died before the widow of the decedent, the question is now raised whether their interests in the estate were vested, or

whether they were contingent upon their surviving the widow, who was the life tenant.

We are of opinion that the remainders given to the daughters Sarah Amanda and Anna vested in them on the death of the testator; and although, never having come into their possession by reason of their death during the pendency of the life estate, these remainders were and are their estates, and are distributable to their personal representatives.

In *Bair's Estate*, 255 Pa. 169-173, Justice Walling said: "The sound rule seems to be that quoted from 1 *Fearne on Contingent Remainders*, p. 214 (4th American Ed.), in appellant's brief, to wit:

" 'For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person in esse and ascertained, in that case, notwithstanding the nature and duration of the estate limited in the remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent, but a vested remainder . . . I am the more particular on this point, from a desire of preventing the errors, which must affect our conclusions upon questions of law concerning this subject, if the uncertainty of taking effect in possession, should form any part of our notion of a contingent remainder.' "

Here the estate was bound to take effect in possession in the two daughters, Sarah Amanda and Anna, if they survived the life tenant, and that seems to be the true test. The mere fact that the remaindermen may not outlive the precedent estate, so as to come into actual possession, will not, without more, render the estate contingent; *Bair's Estate*, supra. Consequently, unless the express language of the testator's will shows a testamentary purpose to the contrary, we are obliged to follow this rule in determining the character of the estate that passed to the two daughters.

It is well settled that the "law favors vested rather than contingent estates, and unless it clearly appears from the context or the circumstances of the case that a contingent interest was intended, the remainder will be regarded as having vested at the death of the testator, and not at the expiration of the life tenancy." *Tatham's Estate*, 250 Pa. 269; *Bair's Estate*, supra.

In the recent case of *Rau's Estate*, 254 Pa. 464, the Court stated the general rule to be, that an interest is to be construed as contingent only where it is impossible to construe it as vested, and said: "The whole policy of the law inclines to the vesting of legacies and allows that policy to yield only where a contrary purpose is expressed in the will."

"A legacy shall be deemed vested or contingent, just as the time shall appear to have been annexed to the gift or the payment of it." *Moore vs. Smith*, 9 Watts, 403-408; *Sternbergh's Estate*, 250 Pa. 187.

The argument in support of the contingent remainders is, that the words in the will "after my whole estate has been converted into money then I give and devise the same to be equally divided between my four children, Sarah Amanda, Anna, Elmer and George," do show a clean intention to limit the vesting in the children surviving on the death of the widow, and that they do not refer to the children at the time of testator's death, but to those who might live at the time of her death. In other words, that we have a condition precedent, the effect of which is to limit the gifts to those of the children who might survive the termination of the widow's life estate, and to make the right to take contingent on such survivorship. To support this contention, it is claimed that the word "then" introducing the clause "I give and devise the same," etc., postpones the time of vesting until after the death of the widow, and makes the time appointed for the enjoyment a contingent part of the description or character of the objects of the gift. We do not agree with this construction. The word "then" as used here undoubtedly refers to the termination of the life estate, and merely fixes the widow's death as the event to precede the passing of the estate into the possession of the children. As being related to the vesting of the estate, the word is not to be construed as an adverb of time, thus postponing the vesting in these children to the termination of the life estate, when those who could take would have to be determined by survivorship. "Then" as introducing the limitation in this will, relates to an event, in no wise uncertain; and is to be construed as equivalent to the prepositional phrase, "in that event," meaning the death of the widow, when the property was to be sold and the remaindermen were to come into possession of their estates. The words "then," "whenever," and their synonyms, almost always appear, where a vested remainder is created, and refer to the time when the property is to be divided and possession enjoyed; and they will not be allowed to make a devise or bequest contingent, unless it clearly appears that they were used to fix the time when the estate should vest and when the remaindermen should be determined: *Stewart's Estate*, 147 Pa. 383-386; *Carstensen's Estate*, 196 Pa. 325, 329; *Wood vs. Schoen*, 216 Pa. 430.

If the devise had been to all of my children then living, or to the then surviving children, the word 'then' would have to be construed as meaning that only those who came within the description at that time, viz., the end of the widow's life estate, would be entitled to take.

In the case at bar the gift is to the children as individuals, each one being mentioned by name and given an equal share in the estate. There is an entire absence of any words expressive of survivorship or of a bequest over, in the event of their death in the lifetime of the widow. The plain inference is that each was expected to take a share at the decease of the testator. He was merely postponing the distribution of his estate among his natural heirs, in order to provide a comfortable income for his widow and their mother during her lifetime. To hold that the remainders to the children were contingent upon their surviving the widow, would result in an intestacy as to the parts of the estate which were to go to the daughters who died before the widow, and utterly defeat the clear purpose of the testator, not to die intestate as to any part of his estate: *McClure's Appeal*, 72 Pa. 416-421.

We think the language of the testator, employed in this will clearly shows his intention, viz, that all his children should have an immediate and absolute interest in his estate, subject only to the life estate in favor of the widow. Without invoking the aid of any rules of interpretation it seems to us, that this will unmistakably shows that all the children and the widow were to be the objects of his bounty, and it was only for the purpose of keeping the estate together so that the widow and children could enjoy the fruits and income of the same for certain periods, that the enjoyment of possession in the children was deferred until after the widow's death. The whole scheme and tenor of the will refute the contention that the estate did not vest in the children at the death of the testator; because he not only provides for the sale of the property during their minority, in case the widow should die, but also appoints guardians for them, thus indicating that whether minors or sui juris, the estate was vested in them subject only to the widow's rights.

In *Letchworth's Appeal*, 30 Pa. St. 175-179, where after the decease of his wife, and when the youngest child should arrive at the age of twenty-one years, the testator then directed all his estate to be distributed by his executors, under the intestate laws; and in case all his children should die without issue during the lifetime of the widow; and the oldest daughter died before the youngest daughter was of age, and after the death of the widow, it was held that she then took a vested interest under the will. The language of Chief Justice Lowrie in that case is very applicable to the case at bar. He said: "By this will the testator constitutes his

widow the head of his family during her life; gives her all the income of his property for her support, and for the maintenance and education of the children; allows her to encroach on the principal for this purpose, if necessary; authorizes his executors to convert his land into money; and finally directs that on the death of his widow, and when his youngest child shall be of age, all his estate shall be distributed agreeably to the intestate laws.

"Now, to our mind, this is a very simple, natural, and just testamentary disposition. The testator was not thinking of devising away the estate from his children and heirs, but only of directing how it should be administered for the benefit of the family so long as it had, or stood in need of a head; and how it should afterwards be distributed. It is not a devise to such children as should be living at a particular time; but a direction for distribution among his natural heirs at a particular time."

Our conclusion is that the estate to the children of the testator vested in them immediately upon his death, and that the shares of Sarah Amanda and Anna must be distributed to their personal representatives, because the power of sale in the will worked a conversion. The testator positively and explicitly directed his whole estate to be disposed of at public or private sale after the death of the widow, and the proceeds he gave to his children in equal shares. This worked a conversion of it into personalty; and the fact that the time of sale was postponed until after the death of the widow, does not prevent a conversion being worked: *Bright's Appeal*, 100 Pa. 602; *McClure's Appeal*, 72 Pa. 414; *Jones vs. Caldwell*, 97 Pa. 42; *McClarren's Estate*, 238 Pa. 220.

COMMONWEALTH vs. HEISLER.

Criminal Law—Breaking and Entering With Intent to Steal—Attempts
—Act 31 March, 1860, Sec. 50, P. L. 442.

Defendant was indicted for feloniously breaking and entering a certain garage with intent to steal the goods therein. The jury found the defendant guilty of an attempt to feloniously enter and break the garage with intent to steal the goods. Held: refusing a new trial, that the jury would have been justified under the evidence, in finding the defendant guilty of actual entry and breaking, but found him guilty merely of the attempt, as they had the right to do, under Act 31 March, 1860, Sec. 50, P. L. 442.

In the Court of Quarter Sessions of Berks County.

No. 206 September Sessions, 1917.

Breaking and entering with intent to steal.

Rule for new trial.

Thos. K. Leidy for defendant and rule.

Harvey F. Heinly and Paul Schaeffer, Assistant District Attorney for Commonwealth.

Opinion by Wagner, J., November 19, 1917.—The defendant was charged in the Bill of Indictment with feloniously breaking and entering the garage of Morris R. Adams with intent to steal the goods in said garage, the property of Morris R. Adams.

Peter McGovern, a detective licensed by this Court, testified that he had received information that this defendant, with two others, on this night in question when the alleged offense occurred, were to come from Philadelphia and arrive in Reading at 1:08 A. M. That the purpose of the three men was to enter the garage of Morris R. Adams to steal his automobile. In accordance with this information he, together with Charles Sanders, the County Civil Engineer, went into Mr. Adams' garage and remained there until close on to two o'clock A. M., when the door of the garage was opened by this defendant. Defendant put his head into the garage and seeing Mr. McGovern and Mr. Sanders, immediately took to flight, followed by Mr. McGovern. Police Officer Campbell ordered defendant to stop. He, however, dodged the officer, and, upon being chased, fell over a cellar door step, and was then arrested by the officer.

Dr. Jesse Wagner testified that he was acting in co-operation with Mr. McGovern and Mr. Sanders, and that he, on North Sixth street, was watching for the defendant and his two companions. That he saw three men going out on North sixth street, turn over to the east side, and then in Elm street in the direction of the garage. Mrs. Dunlap, who lives on Reed street, on which street this garage is located, said she saw three men taking shelter from the rain underneath a bay window right near the garage; that shortly after she heard the firing of a shot, and then saw several men running at full speed. McGovern and Sanders positively identified this defendant as the person who had opened the door of the garage, and who, upon seeing them, had fled.

The defendant testified that he had met a girl at about five o'clock, P. M., went to the Mt. Penn Tower, and remained there until the return of the last car, after which he took her to Ninth and Robeson and left her there at about 12:30 A. M.; that he came in along the P. & R. Railroad to this garage on his way home. That he was at the garage merely for the purpose of obtaining shelter from the rain. When asked who this girl was or where she lived, he could not give either her name or residence.

The jury brought in a verdict of an attempt to feloniously enter and break the garage with intent to steal the goods, the property of Morris R. Adams. Upon the evidence the jury would have been justified in bringing in a verdict of actual entry and breaking. The evidence of McGovern and Sanders was that he had actually opened the door: *Rolland vs. Commonwealth*, 85 Pa. 66.

At the time of the trial counsel for defendant contended and so argued to the jury, that the mere act of opening the door did not constitute a breaking. The jury were told that if they found that there was only an attempt to commit the offense charged in the bill of indictment, that defendant could be found guilty of the attempt to do as charged in the bill of indictment, under Act of 31 March, 1860, Sec. 50, P. L. 442.

Counsel further claims that the Court failed to instruct the jury that if they believed the evidence of the defendant and his witnesses for character, they could acquit. He is evidently mistaken in his recollection of what the Court said, as in no case do we fail to present to the jury the contention of both sides, with proper instructions thereon.

Defendant's other complaint is upon the instructions of the Court on the question of the intent of the defendant in the opening of this garage. The jury, from the charge of the Court, clearly understood that it was only as they found that it was the intent of the defendant to steal the automobile or the goods of Morris R. Adams, and that for this purpose he had broken into the garage, that then only could he be found guilty.

Rule for new trial discharged.

BRENDLE vs. SCHMEHL.**Negotiable Instruments—Accommodation Maker—Liability of Holder in Due Course.**

Where the holder of a promissory note for value sues the maker thereof, evidence of an agreement between the maker and payee that the latter should alone be responsible, is insufficient to prevent judgment, the plaintiff having no knowledge of the agreement.

In the Court of Common Pleas of Berks County.

No. 48 December Term, 1915.

Rule for new trial.

Wm. J. Rourke for defendant and rule.

H. P. Keiser for plaintiff.

Opinion by Wagner, J., November 19, 1917.—The defendant asks for a new trial upon the third reason therefor, which is that

"The Court erred in directing the jury to render a verdict in favor of plaintiff and against defendant for at least \$1,386."

It was admitted by the defendant that he signed the note for \$1,200. The principal of this note, with interest thereon, constituted the basis for the direction by the Court of a verdict for plaintiff for at least this sum. The defendant claims that this note was given upon an agreement between the payee and the defendant, which agreement was communicated to the plaintiff. That is, that there was an agreement between the payee and the maker at the time of the giving of the note that the maker was never to be called upon for the payment thereof. The evidence on this agreement is that of N. S. Schmehl. He testified (N. of T., p. 11) that at the time he gave these notes to Mr. Hoverter, Mr. Hoverter had said that he would take care of them. This, as we view it, is a mere promise between the two that the payee would take care of the notes, and not an agreement that if these notes got into the hands of a third party that the sole person who was to be liable on the note was Mr. Hoverter, the payee. Defendant claims that this agreement as contended for by him was communicated to Mr. Brendle, who discounted the note. We fail to find any evidence of any communication of such an agreement, even if the agreement be considered as one under which Mr. Schmehl was under no circumstance to be held liable for the payment of the note.

Defendant called Mr. Hoverter as a witness to show the communication of this agreement to Mr. Brendle. He testified that at the time the note was transferred by him to Mr. Brendle for a valuable consideration, he gave to him (Brendle) Mr. Schmehl's rating. He says (N. of T., p. 19), "Mr. Brendle, of course, was not acquainted with Mr. Schmehl.

On the strength of the rating he discounted the note with the understanding that I was to make payment." He further says, "I showed Mr. Brendle the rating, and I told Mr. Brendle I considered Mr. Schmehl good, but that I would make payment on them as they matured, because I realized that Mr. Schmehl couldn't make payments on these notes at that time. That is what I said to Mr. Brendle." This is not evidence of a communication of an alleged agreement between him and the defendant that Mr. Hoverter alone was to be liable. On the contrary it is evidence that Brendle, the plaintiff, depended upon Mr. Schmehl's rating, therefore, his name on the note, with the additional personal promise of Hoverter that he would also be liable. This promise to pay by Hoverter is not a release of Schmehl's liability. The position of the defendant as contended for in this third reason for a new trial is not supported by the evidence. Mr. Schmehl in his letter of April 25, 1914 (Exhibit "C") to Mr. Brendle, in writing with reference to this note, distinctly says when he sends to him his check for \$12.50 for a renewal of the note, "I would like to pay note in full but cannot do so at this time." He hereby acknowledges his liability on the note. Under the evidence the Court could not do otherwise than direct that as to this one note the jury would have to bring in a verdict in favor of the plaintiff.

Rule for new trial discharged.

SENSENIG'S ESTATE.

Decedent's Estates—Claim on Partnership Notes—Evidence.

At audit, S presented a claim on four notes made by him and decedent jointly which he claimed the latter had agreed to assume. The evidence showed that S and the decedent had been in partnership and had effected a dissolution. An alderman who assisted in the dissolution testified that at the time when the settlement was made, there was an equity in favor of S, and the decedent had agreed to assume "all joint notes." Four partnership notes were put in evidence. The estate admitted the notes as joint obligations but objected to their payment in whole out of the estate on the ground that claimant had failed to identify them as notes which the decedent had agreed to pay. **Held:** that the claim was sufficiently proven.

In the Orphans' Court of Berks County.

John H. Bridenbaugh for Snyder, claimant.

E. H. Deysher, for accountant.

Opinion by Schaeffer, P. J., December, 1, 1917.—The decedent died on the 18th day of September, 1916, intestate and married, leaving to survive him a widow, Mary A. Sensenig, and issue. There will be no balance, after the payment of claims, for distribution to the widow and children.

[The fund for distribution amounted to \$536. A number of claims were presented, including that of Charles L. Snyder, a former partner of decedent, on four notes made by him and decedent jointly.]

These notes have been presented by Snyder as the joint obligations of the decedent and himself which the former had agreed to assume. As joint obligations of Snyder and the decedent, they are admitted by the estate; but their payment in whole out of this estate, is objected to on the ground that claimant has failed to identify them as notes which decedent alone had agreed to pay. The question, therefore, is whether the notes have been sufficiently identified as the joint obligations of Snyder and Sensenig which the latter agreed to assume.

The testimony—and it is not disputed—shows that Messrs. Snyder and Sensenig, who for sometime prior thereto had been partners in a small moving picture business in this city, on or about August 23d, 1916, determined upon a settlement of their affairs and a dissolution of the partnership. In the adjustment that followed certain real estate, including a property known as the "Cozy Theatre," was traded between the partners; decedent assuming the total liability of outstanding joint notes; and Snyder took over a piano belonging to the partnership. These transactions took place in the office of George W. Milmore, an alderman of the City of Reading; and out of them arises this claim on the four notes in question, Snyder, the claimant, contending that decedent had assumed the total obligation of the notes as part of the consideration for the former's share in the theatre.

The alderman, a careful and conscientious witness, testified to what appears to have been events leading up to and an adjustment of the partnership affairs in his office. On or about August 23, 1916, he had been instructed by the parties to prepare deeds for the transfer of certain real estate. Snyder came first, and asked him to write a deed transferring from Snyder to Sensenig the "Cozy Theatre," for the consideration of \$7,000, including a mortgage of \$2,750. Sensenig followed with a request that he prepare a deed from Sensenig to Snyder, transferring 526 North Thirteenth street for a consideration of \$2,000, including a mortgage of \$1,200. Both deeds were then prepared by the alderman; and, following their execution, the parties came together in his office to discuss matters. They talked "over the business affairs they were settling up, their partnership business apparently." Something was here said about outstanding notes; and while none was exhibited at his office, the alderman understood them to be "joint notes; that is, both parties had been on notes. . . . how many, or for what amount, I don't know. But I know they were

to be assumed by Mr. Sensenig and Mr. Snyder was supposed to remain on the notes until Mr. Sensenig could sell the property." At this stage, also, half ownership of a piano changed hands, Sensenig transferring his half to Snyder at a value of \$75, a receipt of which is in evidence. But no money changed hands at this meeting. There was simply an adjustment of the partnership affairs; and from the transactions that had already taken place and the conversation between the parties, the alderman understood that the outstanding joint notes Sensenig agreed to assume represented the difference in equity between the parties.

At the hearing the Court was not deeply impressed by the testimony in support of the claim; but a careful reading of it since has convinced us that it tends strongly to bear out the contention of the claimant. Certain facts which it aims to establish are not disputed. In the first place, the estate admits the existence of a partnership relation between the parties; and that sometime before decedent's death the partnership had been dissolved. In the second place, the proof of outstanding partnership notes at the time of the dissolution is the submission of the joint notes themselves. So far, consequently, the alderman's testimony is borne out by the facts; and when in the course of the adjustment, following the dissolution of the partnership, it appeared that the equities between the partners were shown to be in favor of Snyder, and Sensenig thereupon agreed to assume the total obligation of joint, partnership notes, it is not difficult to apprehend the alderman's understanding that the notes assumed by Sensenig were to cancel at least part of the equity in favor of Snyder. Moreover, in the light of these facts, it is difficult to get away from the claimant's contention that the notes in question here are the ones Sensenig assumed. For these joint notes were in existence at the time; and the alderman says Sensenig assumed "joint notes." True, the former did not see the notes; but, aside from that fact, is not the term "joint notes" broad enough to include any partnership notes outstanding at the time? In the light of the admitted facts, would any other construction of the term be reasonable? Certainly, at the time there were in existence no less than four notes; and had there been more, which remained unpaid, they would in all likelihood have been presented here. No others have been presented, nor have any come to the notice of the administrator. But even had there been more notes, which Sensenig paid before his death, such a state of facts, instead of weakening, it seems to the Court, would strengthen the probability that all were embraced in the term "joint notes," for a calculation will show that in the adjustment of the partnership affairs, after allowing all the credits decedent was en-

titled to, including the amount of the notes in question, an equity still remained in favor of Snyder. The fact is that here we have the evidence of a dissolution of the Snyder & Sensenig partnership, a closing out of its affairs. One of the partners was leaving the business, the other was taking over all its assets. In the adjustment that followed, the equities being in favor of Snyder, decedent, to square the accounts, assumed the total liability of the partnership notes. It is, therefore, difficult to escape the conclusion that the notes in question, even had there been more, were among the notes that Sensenig agreed to assume.

In these circumstances the claim on the four notes is allowed.

HARVEY'S ESTATE.

Wills—Descent—Per Capita or Per Stirpes.

Decedent gave his whole estate to his wife for life. He provided that after her death it should go to his three children, Joseph Harvey, Emma Crealman and Kate Harvey, during their natural lives, in equal shares, "and after the death of either of said children named, then the same shall go to my grandchildren and their heirs and assigns forever, but should my daughter, Kate Harvey, die without children, then her share shall be divided equal among the children of my son, Joseph Harvey, and my daughter, Emma Crealman." Decedent's widow died, and subsequently his three children. Joseph was survived by two children, Emma by a great-grandson, and Kate died without issue. The children of Joseph asked for a citation to show cause why an inquest in partition should not be awarded, and alleged that they were each entitled to a one-third interest in the estate, on the ground that they took per capita with Emma's grandson. The latter contended that the grandchildren took per stirpes and that he was therefore entitled to one-half of the estate. **Held:** that testator's estate, at his death, vested in the grandchildren in two shares, per stirpes, subject to be divested, to the extent of reducing their shares to create a third in case Kate Harvey left no children; since such partial divestiture never occurred they now take the estate in two equal shares by representation of their parents,—Joseph's children taking one and Emma's grandson the other.

Wills—Words and Phrases—"Among"—"Divided Equal."

Although the word "among" is generally used as a distributive preposition, implying a division among more than two, it will not be decisive of the testator's intention, where the rest of the will indicates that he was not grammatically correct in other instances. Moreover, the word "among" is not infrequently used interchangeably with "between" and the grammatical distinction is not always observed.

The words "divided equal" in distributions does not necessarily import a per capita distribution because the expression is not conclusive one way or the other, it being appropriate, not only to a division among individuals, but also to a division between classes or between an individual and a class.

In the Orphans' Court of Berks County.

Petition for partition of real estate.

Robert Grey Bushong for petitioners

Henry Maltzberger, contra.

Opinion by Schaeffer, P. J., December 1, 1917.—Anderson D. Harvey died January 2, 1881, testate, survived by his widow who has since died, and three children, viz.: Joseph K. Harvey, Emma Crillman (Creelman) and Kate Harvey.

Joseph K. Harvey died November 20, 1907, and left to survive him two children, Anderson B. Harvey and Elizabeth Harvey.

Emma Crillman died November 8, 1899, survived by her husband, Robert Crillman, and a grandson, Cleaver Crillman, son of Harvey Crillman, a deceased son, who died August 6, 1895, intestate, survived by his widow, Dollie Crillman, and his said son, Cleaver.

Kate Harvey, the daughter of decedent, died unmarried and without issue, July 31, 1917.

By his last will and testament he disposed of his estate as follows:

"Second: I give and bequeath unto my dear wife Eliza Harvey all my real estate and personal property of every description during her natural life.

"Third: And after the decease of my wife Eliza Harvey I give and devise the same unto my three children namely Joseph K. Harvey, Emma Creelman and now intermarried with Robert Creelman and Kate Harvey during their natural lives in equal shares and they shall have equal benefits of all the real estate, and after the death of either of said children named then the same shall go to my grandchildren and their heirs and assigns forever, but should my daughter Kate Harvey die without children then her share shall be divided equal among the children of my son Joseph K. Harvey and my daughter Emma Creelman, intermarried with Robert Creelman."

The three children of the decedent, who were the life tenants of the whole estate after the widow's death, having died, a petition was presented by Anderson B. Harvey and Elizabeth Harvey, the children of Joseph Harvey, deceased, asking for a citation directed to all the parties in interest to show cause why an Inquest in Partition should not be awarded to make partition of the real estate among the parties in interest. The petitioners allege, inter alia, that they are each entitled to one-third interest in said real estate; and that Cleaver Crillman, the great-grandchild, is entitled to one-third interest subject to the dower interest of his mother, Dollie Crillman. An answer was filed by Cleaver Crillman denying that Anderson B. Harvey and Elizabeth Harvey are each entitled to a full one-third interest in the real estate of the

decendent, and alleges that each of them is entitled to less than a full one-third interest.

The question raised on the petition and answer, therefore, is the quantity of interests taken by the respective grandchildren. Do they, in other words, take per capita or per stirpes?

In the determination of this question, it will be observed that having been to testator's children for life with remainder to his grandchildren, the interests involved vested in the grandchildren upon the death of the testator. This is true, regardless of the proportions which they take. If per stirpes, they vested in the two classes living at testator's death, subject to be divested to the extent by which two shares might have been reduced to provide for a third; if per capita, they vested in them as a class subject to be opened to let in after born children. But whether per stirpes or per capita, or both, their interests vested at testator's death, for the rule is that "a legacy will be regarded as vested rather than contingent unless the language of the will indicates that the testator had a different intention:" *Carstensen's Estate*, 196 Pa. 336.

The petitioners, asking for a per capita distribution, contend that the estate vested in the grandchildren as a class. The general rule, applicable to class legacies, is that "a bequest to a number of persons not named, but answering a general description, is a gift to them as a class: *Denlinger's Estate*, 170 Pa. 104. Distribution in such cases must be per capita: *Scott's Estate*, 163 Pa. 165; *Brundage's Estate*, 36 Supr. Ct. 211. But this rule is subject to qualification. For in *Sorver vs. Berndt*, 10 Pa. 213, the Supreme Court has observed that "this rule of construction is intended to settle the testator's intentions where they do not sufficiently appear in the will itself." In the search for that intention, again observes the court in *Horwitz vs. Norris*, 60 Pa. 261, "the first thing to be considered is the language he has selected to express his intention." And in doing this "all his words are to be considered; and they are to be given their natural effect if this can be done without violating any rule of law:" *Denlinger's Estate*, supra. To reject any of them would be against the plainest canon of construction: *Sorver vs. Berndt*, supra. Should testator's intention still remain obscure, the law then leans in favor of a distribution as nearly conformed to the general rules of inheritance as possible: *Smith's App.*, 23 Pa. 1; *Minter's Appeal*, 40 Pa. 111; *Ashburner's Estate*, 159 Pa. 545. Consequently, to safely conclude that these interests go to the grandchildren as a class, it must appear from testator's language, without rejecting any of it, that such was his intention. Should, however, his intention still remain doubtful, the doubt is to be resolved in favor of a statutory distribution.

So far as his children are concerned, testator's intention is expressed clearly enough; and it is only with respect to his grandchildren that any obscurity appears. While the former lived they were to enjoy equal benefits in all of the real estate, and following their deaths it was to pass to the grandchildren. As remaindermen their identity is thus left in no doubt, but the proportions in which the grandchildren are to take was not fixed. Testator contented himself with saying, simply, "the same shall go to my grandchildren."

Standing alone, these words would undoubtedly import an intention to give the estate to the grandchildren as a class. But since it is a question of intention, as throwing light on testator's intention, due weight must be given to what immediately precedes these words, where he has made the gift to the grandchildren dependent upon "the death of either of said children named." Consideration of the last quoted words casts the first doubt upon the correctness of the contention for a class legacy. For it will be observed that he has clearly indicated an intention here to divide his estate into three shares. Such a division obviously militates against the idea of a class division, since only one and not all of the shares upon the death of a life-tenant was to pass to the remaindermen at a time. Moreover, while upon the death of any one of his children—the word "either" here being employed erroneously for "any"—the share of the one so dying was to pass finally to the grandchildren, he specifies no particular ones, the natural effect of these words is to pass the share directly to the children of the life-tenant so dying. To hold that testator here meant otherwise, it seems to the court, would be to convict him of something plainly not his intention—inequality in the disposition of his estate. Certainly, in his treatment of his children, he clearly intended nothing of the sort; for he says, "they shall have equal benefits of all the real estate." Why, then, when he came to his grandchildren should his aim at equality be held to have changed? If at the death of the first of testator's children, the court had held this a class legacy, the effect would have been to give to one set of grandchildren part of a share in this estate while their parent still remained in enjoyment of another full share. No such intention of inequality appears anywhere in testator's will.

A second doubt against the contention for a class legacy is raised by the provision in the will, disposing of Kate Harvey's share in the event of her death without children. In such case, "her share shall be divided equal among the children of my son Joseph K. Harvey and my daughter Emma Crealman." Here again testator clearly had in mind the division of his estate into shares; and unless we go the step

further and concede his intention to give, not only this share but the other two, to his grandchildren by representation, we shall not only ignore this provision altogether, but fail to answer the question of why he should have concerned himself about her share in case she died without issue, if he had intended a per capita distribution, in the prior disposition of the remainders to "my grandchildren." Equality is essential to a disposition per capita: *Fleck's Estate*, 28 Supr. Ct. 466-68. No such equality in the distribution among the grandchildren could be effected, if the daughter, Kate Harvey, had had issue. But aside from this, testator must be held to have understood the effect of a provision giving to his grandchildren as a class. He must be presumed to have known that, without saying more, the class would open to receive afterborn grandchildren, the children of Kate Harvey: *Sipe's Estate*, 30 Supr. Ct. 145. Consequently, assuming that he did know this, the adoption of the petitioners' view requires us to charge testator with having written into his will a wholly unnecessary and meaningless provision. To construe this gift to the grandchildren a class legacy, to put it in another way, we should have to reject the special provision disposing of Kate Harvey's share, in the event of her death without children, contrary to the plainest canons of construction: *Sorver vs. Brandt*, 10 Pa. 213.

The doubts thus raised by testator's language, in the opinion of the court, militate too strongly against petitioners' contention for a class legacy, to be adopted by the court. His clear intention to divide his estate into three shares, the natural effect of which, upon the death of one of his children, is to give his share to his children, combined with his otherwise inexplicable disposition of Kate Harvey's share, should she die without children, forbid the construction asked for. On the contrary, it is the conclusion of the court, gathered from the intention of testator, either expressed or clearly implied, that the grandchildren take their shares in the estate by representation of their parents.

This conclusion applies to the shares given for life to the son, Joseph K. Harvey, and the daughter, Emma Crealman; and we think the arguments in its favor apply with almost equal force to the share of Kate Harvey. With respect to her share, testator's intention while not quite so clear, seems clear enough. Should she die without children, he says, "it shall be divided equal among the children of my son Joseph K. Harvey and my daughter Emma Crealman." His intention conveyed by his language, harmonizing with what precedes it, appears to be to divide the grandchildren into two classes; and while the use of the word "among," which is a distributive preposition employed for a division among more than two, seems to negative such an intention, we have already seen

that testator cannot be held too strictly to account for the accuracy of his grammar. Moreover, as said in *Griskey's Estate*, 248 Pa. 90, the word "among" is not infrequently used interchangeably in distributions with "between" and the grammatical distinction is not always observed.

The words "divided equal" employed by testator here, might also be said to negative such an intention; but *Kenworthy's Estate*, 19 Dist. Rep. 987, holds that the word "equal" in distributions does not necessarily import a per capita distribution, because the expression is not conclusive one way or the other, it being appropriate, not only to a division among individuals, but also to a division between classes or between an individual and a class. At any rate, to impute to him a desire to divide this share between the two classes of grandchildren, is in harmony with his general intention; and if any doubt of the correctness of this construction remains, that doubt must be resolved in favor of a statutory distribution. Thus resolved, the distribution would be per stirpes, for it must be remembered that this share passes, not from the daughter, Kate Harvey, who had but a life estate in it, to her nephews and nieces, but from the testator, under his will, through his children, who were all living at his death, to his grandchildren.

The conclusion of the court is, therefore, that testator's estate, at his death, vested in the grandchildren in two shares, per stirpes, subject to be divested, to the extent of reducing their shares to create a third in case Kate Harvey left children. She having died without children, such partial divestiture never occurred. Consequently they now take the estate, in two equal shares, by representation of their parents.

MERTZ vs. GREENWICH TOWNSHIP.

Justices of the Peace—Jurisdiction—Injuries to Automobile—Negligence.

Where an action in assumpsit is brought before a justice of the peace to recover for injury to an automobile sustained by reason of the alleged negligence of supervisors in not providing guard-rails for a dangerous piece of road, the judgment will be reversed on certiorari, the cause of action being in reality trespass and not assumpsit, and the justice having no jurisdiction.

In the Court of Common Pleas of Berks County.

No. 53 November Term, 1917.

Certiorari.

John B. Stevens for defendant and certiorari.

John Mertz brought suit in assumpsit before Justice of the Peace James H. Guildin, Jr., to recover \$210, which he alleged was the expense he was put to for repairs to his automobile, which was damaged while driving along a public road in Greenwich Township near Kerchner's Mill. The testimony showed that there were no guard rails at the approach to the bridge, and that for that reason the automobile slid down the embankment. The justice entered judgment for the plaintiff, the record being as follows:

"Taking all evidence under proper and careful consideration it appears that the supervisors of Greenwich Township were negligent in not providing proper protection, in the form of erecting and maintaining guard-rails on the side where the accident happened and judgment is accordingly rendered in favor of the plaintiff."

Defendant took a certiorari alleging want of jurisdiction, on the ground that the suit was in reality one to recover damages for negligence.

Per curiam, Dec. 3, 1917.—Judgment reversed.

HEMMING vs. FISHER.

Workmen's Compensation Board—Appeal—Workmen's Compensation Act of 1915.

The Workmen's Compensation Board found as facts that the claimant after completing work for the day and while on the premises of defendant, descending steps from the third to the second floor of the building in which she was employed, fell and sustained injuries; that she had finished her work for the day and that the stairway was well lighted and in good condition, and that the accident was not caused by the condition of the premises, nor was it due to the operation of the employer's business or affairs thereon. **Held:** that while the Act of 1915, Sec. 301, second paragraph, makes certain injuries compensable where the employee is not actually engaged in the furtherance of the business or affairs of the employer, yet, in order to have a claimant come within this class, the injuries must be caused either by the condition of the premises, or by the operation of the employer's business or affairs upon the premises; both of which are negatived by the Board's findings of fact which are conclusive upon the Court.

Words and Phrases—"Actually Engaged"—"Condition of the Premises."

"Actually" as we are taught by the lexicographers, and are accustomed to use it in ordinary speech, means "really," "in fact," as opposed e. g. to "theoretically," constructively," and the like.

"Actually engaged" therefore means engaged in reality and fact according to the sense the phrase would have in ordinary parlance. Therefore, an employee who has quit work for the day and started on his way home cannot be said to be "actually engaged" in the furtherance of the business of the employer.

The phrase "condition of the premises" manifestly relates to the state of repair, convenience or safety, etc., of the place of employment and is not synonymous with and does not cover the location of it with reference to the stories of the building in which it is.

Statutes—Construction—Legislative Definition of Terms.

A legislative definition of terms employed in a Statute is binding upon the Courts.

The construction put upon a Statute by the public authority charged with its administration, and therefore with its interpretation in the first instance, has a peculiar claim upon the consideration of the Courts.

In the Court of Common Pleas of Berks County.

No. 47 October Term, 1917.

Appeal from Workmen's Compensation Board.

Charles W. Matten for plaintiff and appellant.

Snyder, Zieber & Snyder for defendant.

Opinion by Endlich, P. J., December 3, 1917.—This is an appeal from the action of the Workmen's Compensation Board setting aside an award made to the claimant by the Referee. The facts found by the Referee are:

"(a) That the claimant, Ivy Hemming, was employed by defendant and on Nov. 17, 1916, after completing work for the day and while on premises of defendant, descending steps from third to second floor of building in which claimant was employed, met with an accident and sustained injuries which have prevented claimant from working from Dec. 5, 1916, and is still totally disabled.

"(b) That claimant was employed as a looper in factory operated by defendant and had finished her work for the day and after so doing started down the steps from third to second floor of factory when she fell and sustained injuries to right leg which resulted in present condition."

To these the Board added the following:

"(g) That the said stairway was well lighted and in good condition and that the accident was not caused by the condition of the premises nor was it due to the operation of the employer's business or affairs thereon."

These findings are conclusive upon this Court in the present proceeding: *Poluskiewicz vs. Coal & Iron Co.*, 257 Pa. 305, and necessarily constitute all the facts we are at liberty to look at as the basis of our decision.

It is conceded that the question of the right of the claimant to compensation for the injury she has received arises under Art. III, sec. 301, of the Workmen's Compensation Act of 1915. That section provides, in the first paragraph, that—

" . . . compensation for personal injury to . . . employe, by an accident, in the course of his employment, shall be made in all cases . . . without regard to negligence, . . . provided that no compensation shall be made when the injury . . . be intentionally self-inflicted, . . ."

and in the second paragraph as follows:

" . . . The term 'injury by an accident in the course of his employment' . . . shall not include an injury caused by . . . a third person intended to injure the employe because of reasons personal to him, . . . but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment."

If the present inquiry depended alone upon the interpretation of the general language used in the first paragraph, the decisions which the industry of claimant's counsel has collected from other jurisdictions under statutes more or less similar to ours might be persuasive authority for holding the claimant's injury to be compensable under our statute. But the latter, differing from those statutes, undertakes in the second paragraph to explain specifically the meaning of the phrase "injury by an accident in the course of his employment" as used in the first paragraph and elsewhere in Art. III. A legislative definition of the terms employed in a statute is of course binding upon the courts: *Durkin vs. Coal Co.*, 171 Pa. 193; *Com. vs. Curry*, 4 Pa. Super. Ct. 356. It is true, as pointed out in *Wilberforce*, Statute Law, p. 299, that a declaration by the Legislature that a certain phrase "shall include" certain things has been held to be used "by way of extension and not as giving a definition by which other things are to be excluded." But manifestly, whether such phraseology is to have the effect of a definition strictly speaking or not must depend upon the intention of the Legislature gatherable from the enactment. Nor ought it to be overlooked that it is a common-sense and general rule in the interpretation of statutes that enumeration weakens, as to things not enumerated: *Page vs. Allen*, 58 Pa. 338, 346. It seems significant here that the second paragraph of sec. 301 declares that certain injuries shall not be included in the general language referred to, and that certain others shall be. The purpose would thus appear to be, not extension, but definition, and it is so understood by the Workmen's Compensation Board, whose understanding of the statute is entitled to great respect, under the familiar principle that the construction put upon a statute by the public authority charged with its administration, and therefore with its inter-

pretation in the first instance, has a peculiar claim upon the consideration of the courts.

Looking at the plain language of the Act of 1915, sec. 301, second paragraph, compensable cases are divided into two general classes,—those in which the injury is sustained by the employe while actually engaged in the furtherance of the business or affairs of the employer, and those in which the employee was injured while not so actually engaged. The actual engagement spoken of must be assumed to have a more limited sense than the general phrase “in the course of his employment,” because of the fact that injuries sustained under certain circumstances when the employe is not so actually engaged are expressly dealt with in the succeeding provision. It may be suggested that, if the general language were not meant to be restricted, there would be no need of specifically treating of either of these classes. *Expressio unius est exclusio alterius*. Moreover, the literal and direct sense of the phrase would point to the meaning indicated. “Actually,” as we are taught by the lexicographers and are accustomed to use the word in ordinary speech, means “really,” “in fact,” as opposed, e. g., to “theoretically,” “constructively,” and the like. “Actually engaged,” therefore, means engaged in reality and fact according to the sense the phrase would have in ordinary parlance. So understood, the language of the statute would seem to exclude from this class an employee who has quit work for the day and has started on his way home. The mere fact, if it be a fact, that the claimant was obeying her employer’s rules and regulations regarding the conduct of employes while entering and leaving the building, would not justify her being treated as at the time actually engaged in the furtherance of her employer’s business, even if there were, as there are not, any findings here showing the existence or nature of the supposed regulations. It follows that the claimant in the present case, if entitled to compensation at all, must be entitled thereto as coming within the other class above mentioned.

In order to come within this second class of cases made compensable by the enactment under construction, certain requirements must be met. First, the injury must have occurred “upon the premises occupied by or under the control of the employer, or upon which the employer’s business or affairs are being carried on.” (It is admitted that the claimant’s case satisfies this requirement). Second, the employee’s presence on the premises must have been demanded by the nature of his employment. (This also is admitted). Third, the injury must have been caused either (a) by the condition of the premises, or (b) by the operation of the employer’s business or affairs thereon. There is nothing here that would

justify the Court in declaring that the injury to the claimant was caused either by the condition of the premises or by the operation of the employers business or affairs upon the premises. The contrary is expressly found as a matter of fact by the Workmen's Compensation Board, and as already remarked, by that finding we are concluded. Even if it were possible to treat the finding (g) as one mixed of law and fact and therefore as not conclusive, it is not and hardly can be contended that the location of defendant's factory, where claimant worked, on the third floor of the building, and the fact that it was in descending therefrom that she was injured, would warrant the conclusion that the injury was caused by the "condition of the premises." Manifestly that term relates to the construction, state of repair, convenience or safety, etc., of the place of employment, and is not synonymous with and does not cover the location of it with reference to the stories of the building in which it is. The decision of the Board refusing compensation to the claimant is perhaps a hardship upon her which should not be permitted to stand if ground for its reversal could be fairly found in the law. But as pointed out in *De Voe vs. N. Y. State Rys*, 155 N. Y. Supp. 12, whilst statutes such as the Act of 1915 are remedial and to be liberally construed for the purposes for which they are designed, they are not to be extended by implication to accidents not clearly within their language. We are constrained to hold that under the statute controlling we cannot sustain this appeal. If the result seems unsatisfactory and is to be regarded as wrong in principle and as at variance with the general policy and purpose of the Act of 1915, yet clearly the remedy rests with the Legislature. We have no power to make or alter statutes; we can only apply them as they are given to us.

The appeal is dismissed.

MORGAN vs. DUCHYNSKI.

Automobiles—Collision at Street Crossings—Right of Way—Negligence.

It has been laid down as a general rule that one reaching the intersection of a street first has the right of way, and in determining whether he can safely cross he need not anticipate a sudden violation of the law of the road by an approaching driver. This is in line with the doctrine repeatedly laid down by our Supreme Court, that a man is not required to guard against the unexpected negligence of another, but is at liberty to presume that the other party will act in conformity with the law and his duty,—especially where that party fails to give any signal capable of being understood as a warning that he intends to arrogate to himself the right of way.

In the Court of Common Pleas of Berks County.

No. 19 January Term, 1917.

Rules for new trial and for judgment n. o. v.

B. Y. Shearer and Cyrus G. Derr for defendant and rules.

William Kerper Stevens for plaintiff.

Opinion by Endlich, P. J., December 3, 1917.—It was suggested by the learned counsel for the defendant in his argument of these rules, and is undoubtedly true, that there is not much difference between the facts as contended for by the one party to this action and the other. On May 12, 1916, defendant's delivery automobile, about 1,900 pounds in weight, was traveling at high speed upon one of the main highways of the county, approaching a cross-road, without blowing the horn. At the same time the plaintiff's driver was driving a touring car weighing about 4,800 pounds on the cross-road spoken of, towards the highway, blowing his horn. His speed when entering on the highway was about 12 miles per hour. He saw the defendant's automobile approaching at a distance of about 75 feet from the point of intersection of the highway and the cross-road, too late, according to his testimony, to stop and let defendant's automobile pass ahead of him. The front part of the plaintiff's car got over the centre of the highway when defendant's automobile struck the rear wheel with such force as to lift the heavy car, turn it at right angles, and throw it into the ditch by the side of the highway, injuring it quite badly. There was a space of 12 or 15 feet to the rear of plaintiff's car where defendant might have passed it, or he might have avoided a collision by turning into the cross-road. At the trial, all the points submitted by defendant except the request for binding instructions were affirmed by the Court in its charge to the jury. The verdict was for the plaintiff, and defendant is now asking for judgment non obstante veredicto or for a new trial.

His contention is that the plaintiff's driver miscalculated the chance of his passing ahead of the defendant's automobile in safety, and that his attempt to do so was contributory negligence on his part, in view of the approaching automobile of the defendant. If his act was simply an error of judgment, unexcused by the circumstances, then, under *Gangawer vs. R. R. Co.*, 168 Pa. 265, 270; *Tozer vs. Ry Co.*, 45 Pa. Super. Ct. 417, 421, (and see *Patton vs. Traction Co.*, 132 Pa. 76; *Thomas vs. Ry Co.*, ib. 504; *Tyson vs. Traction Co.*, 199 id. 264), that error might be what the law calls negligence and does not permit a jury to call anything else. It is, however, laid down in *Dairy Co. vs. Shepherd*, (Ind.) 108 N. E. 234, that

the general rule is that one reaching the intersection of a street first has the right of way, and in determining whether he can safely cross he need not anticipate a sudden violation of the law of the road by an approaching driver. The former of these propositions seems to be in accord with common sense and universal practice; and the latter is in line with the doctrine repeatedly announced by our Supreme Court, that a man is not required to guard against the unexpected negligence of another: *Clark vs. Lloyd Co.*, 254 Pa. 168, but is at liberty to presume that the other party will act in conformity with the law and his duty: *Reeves vs. R. R. Co.*, 30 id. 454, 462; *Bard vs. Ry Co.*, 199 id. 94, 98,—especially where that party fails to give any signal capable of being understood as a warning that he intends to arrogate to himself the right of way. Nor is it to be overlooked that, under the evidence, there was ample room for the defendant's automobile to pass in the rear of the plaintiff's car, or at least turn it so as to avoid a collision: see *McIlhenny vs. Baker*, 63 Pa. Super. Ct. 385. If there was, as the defendant alleges, no time for so doing, that, according to the finding of the jury under the charge, must have been due to the great speed at which he was running, (proven, not only by testimony, but also by the effect of the impact as above stated), and therefore to the default of the defendant.

A careful review of this case leads to the conclusion that it was one for the jury, and that there is no room for the entry of a judgment non obstante veredicto and no sufficient ground shown for the granting of a new trial.

The rules to show cause are discharged.

KNECHT vs. KNECHT

Contracts—Husband and Wife—Question for Jury.

Plaintiff sued defendant to recover \$1,800, and alleged in her statement of claim that she was the wife of defendant; that she had entered into an agreement with him under which she gave him her wages from time to time upon his promise to invest the money and account to her for it, with accumulated interest; and that after this arrangement had been carried on for a number of years he deserted her and refused to pay back the money. The defendant's affidavit of defense denied the marriage, the alleged promise to return the money, and the desertion; and averred a contract with plaintiff that he should receive her wages and pay her board and other necessities therefrom; and that he had expended for her more than he had received, and asked for a certificate in his favor for the balance. The jury found for the plaintiff. On rule for new trial, **Held:** that the allegation of marriage and desertion in plaintiff's statement was not necessary to entitle the wife to sue, and that the only issue presented by the pleadings was whether the contract was as alleged by the plaintiff or by the defendant, which was for the jury.

Husband and Wife—Right of Wife to Sue for Recovery of Her Separate Property—Act 27 March, 1913, P. L. 14—Act 8 June, 1893, Sec. 3, P. L. 344.

Under Act 27 March, 1913, P. L. 14, which, inter alia, amends Sec. 3, Act 8 June, 1893, P. L. 344, desertion or separation without cause is no longer made a prerequisite to the right of a wife to maintain a suit against her husband for the recovery of her separate property.

In the Court of Common Pleas of Berks County.

No. 28 October Term, 1916.

Rules for new trial and for judgment n. o. v.

Earle I. Koch and W. B. Bechtel for defendant and rules.

D. N. Schaeffer & Son for plaintiff.

Opinion by Wagner, J., December 22, 1917.—This is an action by the plaintiff, S. Kathryn Knecht, against the defendant, Elmer Knecht, for the recovery of \$1,800, with interest from April 3, 1916. In the statement she avers that after her marriage with the defendant on August 14, 1908, she continued to work as she had done when single and for such work received money and wages amounting to more than \$1,800. That, in consideration of the promise of the defendant that he would accumulate and invest the money and wages and account for and pay to her the money so accumulated and invested, together with such interest as it might have earned, the plaintiff, after each pay day, delivered and gave to the defendant the money and wages so earned and received by her. That the defendant on April 3, 1916, wilfully and maliciously and without justifiable cause, deserted the plaintiff, his wife, and their daughter, Margaret Jane Knecht. From this statement it will be seen that the basis of the suit is the alleged promise of the defendant that he would accumulate and invest the money and wages received from the plaintiff and account and pay it to her, together with such interest as it might have earned. The plaintiff considered that she was the wife of the defendant. It is evident that the allegation of marriage and the further allegation that the defendant on April 3, 1916, wilfully and maliciously and without justifiable cause deserted the plaintiff, was made a part of the statement to declare the wife's right to bring the suit under Sec. 3, Act June 8, 1893, P. L. 344. In thus declaring, plaintiff lost sight of the Act of March 27, 1913, P. L. 14, which, inter alia, amends Sec. 3, Act of 1893, in that desertion or separation without cause is no longer made a prerequisite to the right of a wife to maintain a suit against her husband for the recovery of her separate property.

The defendant in his affidavit of defense denied the alleged marriage, the alleged promise to return the money, and the wilful and malicious desertion. He averred that the wages

that he had received from plaintiff had been received for the purpose of paying her board and disbursing the same to her for spending and other needs that she required, and not for investment and accumulation, at interest, and to account to her for it as she had alleged. He admitted that he had received from her \$1,283.55, but averred that he had paid out for her with her knowledge and consent and by her direction and request, the sum of \$1,439.26, leaving her in his debt to the extent of \$155.71, for which amount he made a counter-claim, and for which he asked a certificate.

From this affidavit of defense it is seen that the defendant's sole defense to plaintiff's claim is the denial of the promise to return the money as claimed by her, and the setting up of another agreement, namely, that he received the money upon the condition that out of it he was to pay for her expenses, including maintenance, board, etc., with the further averment that he had paid out the amount of money that he claimed he had received with an excess of \$155.71, which he claimed was due to him. The affidavit of defense does not aver as a defense that defendant is entitled to deduct from the moneys paid to him the sums expended by him for plaintiff's support upon the ground that she was not defendant's wife. Neither was the trial had upon the issue of the implied right of defendant, if not plaintiff's husband, to deduct from the moneys received, his expenditures. That is, we have the only issue presented by the pleadings: whether the agreement upon which the defendant received the plaintiff's wages was as declared by her or as averred by him, together with their evidence on this question only.

In support of this issue thus raised we have this testimony. The plaintiff testified (N. of T., p. 25):

"Q. What were the circumstances under which you gave him your money, the Davies' money? A. I gave it to him to put in bank with the understanding that he was to put it in bank in both of our names, so that when we got about 40 or 45 years old we wouldn't have to work, and whenever I wanted it I could have it."

On pages 26, 27 and 28 of N. of T. she testified that the foregoing agreement was that upon which she gave to him her other moneys:

The defendant (N. of T., p. 83) testified that the agreement upon which they lived together was:

"I agreed with her under these conditions: that she was to pay her way the same as before, and I was to pay mine, and if at any time we were separated then what would be left of her money would be returned to her after her expenses had been paid, all medical attendance, board, and so on, spending, etc."

This issue thus raised by the pleadings and the evidence was squarely submitted to the jury in the latter part of the charge where we said (C. of the Court, p. 9):

"The next question then will be the contract or agreement upon which this money was received by the defendant from the plaintiff. She says that this money was received upon the agreement that it was to be placed in the bank in the joint names of both until they got to be forty or forty-five years old, but that whenever she wanted it she could have it. That is what she contends is the contract. He says that is not the contract. His testimony is that when they entered into this agreement to live in an illicit manner they further agreed that she was to pay her way just the same as before, and that when they settled up their accounts, if anything was left after paying her expenses, medical attendance, board, etc., then the balance was to be returned."

The jury in finding a verdict for the plaintiff therefore found the agreement as contended for by her. Upon the pleadings and evidence in this case the only matter that was necessary to be submitted to the jury was whether or not the contract upon which the money was received was that as claimed for by the plaintiff or by the defendant. In the trial of this case plaintiff considered it necessary to prove a marriage to enable her to recover the money sued for. That is, the plaintiff assumed a burden not necessary to be assumed. This question of marriage was submitted by the Court to the jury. In this there was no harm done to defendant, as under the pleadings and the evidence the jury could have rendered a verdict for the plaintiff based upon the plaintiff's alleged agreement, without finding that the defendant and plaintiff were man and wife. The presentation of the case to the jury in this manner worked no harm to the defendant. He, therefore, can have no cause of complaint upon this ground.

Defendant's contention for a new trial and for judgment n. o. v. is based entirely upon that part of the evidence and the charge bearing upon the question of marriage, and not upon the evidence or the charge in the submission of the question of whether or not the contract was as alleged by the plaintiff. Even if that question, by reason of the manner of trial, was necessary to be submitted to the jury, we consider that no error was committed. The plaintiff (N. of T., p. 2) testified to the words that she alleged constituted the agreement of marriage between the two. Taking those words in connection with the evidence of the 13 witnesses upon the question of subsequent cohabitation and reputation, among them defendant's pastor and the wife of his employer, we cannot see how, as a matter of law, the Court could have held that the words claimed by her to constitute the marriage agreement

were not such an agreement. The meaning of these words in the light of the entire evidence submitted in the case, was for the jury: *Park vs. Kansas So. Ry. Co.*, 58 Pa. Superior Ct. 419, 421.

The defendant contended that this relationship was meretricious from the beginning, and that therefore it must be presumed to continue as such. In support of this he cited *Hunt's Appeal*, 86 Pa. 294; *Grimm's Estate*, 131 Pa. 199; *Reading Fire Insurance & Trust Co., Guardian*, 113 Pa. 204, and *Tholey's Appeal*, 93 Pa. 36. An examination of these cases shows that either cohabitation or reputation were for a very short period of time or that there was direct evidence, on the part of the person claiming marriage, to show that no such marriage as claimed for existed. They are, therefore, not authorities ruling this case. When the illicit relations existed between the two parties to this suit they were, as in *Hines's Estate*, 10 Pa. Superior Ct. 124, living entirely apart from each other.

In the ninth reason for a new trial there is assigned as error the statement of the Court "from that time on their relations changed." At the time this reason was filed the charge had not been certified to by the Court, and upon reference by the stenographer to the notes, it was found that in transcribing the charge there had been omitted the words "and that." This disposes of that assignment.

In the tenth reason that part is alleged as error, where we stated "because there certainly was sometime when there came a changed relationship, when this courtship relationship changed to the relationship of them living together as man and wife." The evidence of all parties, including the defendant, showed that there was a time when this relationship did change, and when they did live together as a man and a wife live together. A number of times, in the charge, we specifically stated to the jury that it was for them to determine from the evidence whether or not they were man and wife. This portion of the charge cannot, therefore, be distorted into a statement by the Court that they were man and wife. The meaning of this, considered in connection with the entire charge is clear; that is, that they lived together as a man and wife live together, without the assertion that they were actually man and wife.

The eleventh refers to that portion of the charge wherein we said that two people can agree to be married, and that the contract so made, even though unwitnessed, would be a lawful contract of marriage. The meaning of what we there said was that two people can get together, make an agreement of marriage, a civil contract, the same as any other agreement can be made, and that it is not necessary for a witness to be

actually present to hear the words that constitute the agreement between the two parties when they make that agreement. The agreement does not need to be entered into before witnesses, but there should be evidence of the agreement, as there was in this case, by subsequent cohabitation and reputation of that agreement thus entered into. That is, there is a distinction between the agreement itself and the evidence of that agreement. This we conceive to be the law under Hines's Estate, *supra*; Richard vs. Brehm, 73 Pa. 140, 144; Comly's Estate, 185 Pa. 208; Com. vs. Haylow, 17 Pa. Superior Ct. 541; Thewlis's Estate, 217 Pa. 307.

Rules for new trial and judgment n. o. v. discharged.

SCHARADIN vs. SCHARADIN

Divorce—Prior Divorce Action as a Bar—Res Adjudicata.

A libel in divorce will be dismissed and the divorce refused where the evidence shows that the libellant had previously begun a divorce action upon the same grounds against the respondent in another jurisdiction, in which action the divorce had been refused by the Court on the merits of the case.

The fact that the Court's opinion in refusing the divorce in the prior case upon the evidence and facts, referred to the question of jurisdiction as a possible objection to the entry to any decree in favor of the libellant, does not prevent the decree from being a bar on the principle of *res adjudicata*.

In the Court of Common Pleas of Berks County.

No. 6 May Term, 1916.

William A. Shomo for libellant.

Lloyd M. Schaeffer and A. H. Rothermel for respondent.

John M. Bridenbaugh, master.

Opinion by Endlich, P. J., December 22, 1917.—When this case was heard before the Master, it appeared by record evidence which was accepted by the parties as competent, that a proceeding for divorce had been brought by the same libellant against the same respondent and on the same grounds as those here alleged, in the Court of Common Pleas of Schuylkill County to No. 197 May T. 1895, and that that Court, on Feb. 24, 1896, refused a decree. The Master held this to constitute a bar, on the principle of *res adjudicata*, to the present proceeding, and recommended a dismissal of the libel accordingly. It is contended on the part of the libellant, however, that in this he was in error, because, as it is alleged, the decision of the Schuylkill County Court turned on the question of jurisdiction, the Court holding that it had no jurisdiction

to determine the case, in which event it had no power to pass upon its merits, and for that cause dismissing the libel. If this were a correct view of the decision in question, the cases cited by the libellant's counsel from other jurisdictions might afford persuasive authority for sustaining his contention and requiring a reference of the case back to the Master for further findings and report. But a careful examination of the opinion rendered by Judge Bechtel in the Schuylkill county case compels the conclusion that the Master is substantially right in his interpretation of it. Judge Bechtel's decision proceeds at some length and detail upon a consideration of the evidence and facts of the case, and reaches the result that, upon the evidence and facts, that is to say, upon the merits of the case, the libellant failed to entitle himself to a decree of divorce. After reaching and announcing that result, the concluding paragraph of Judge Bechtel's opinion refers to the question of jurisdiction, that is to say, using his own language, he "mentions" that as a possible objection to the entry of any decree; but he does not base his decision upon it. He says, in substance, that the libellant, having removed from Schuylkill county to Philadelphia, ought to have more conclusively shown his resumption of residence in that county in order to "establish" the jurisdiction of its Court; but he does not declare as a fact the lack of such residence on the part of the libellant or the want of jurisdiction in the Court. The whole matter seems to be thrown out rather by way of suggestion than as a ground of decision, and as the Master intimates, there is no proof here that the libellant was not, as claimed in his petition, at the time a resident of Schuylkill county. In other words, the lack of jurisdiction of the Schuylkill County Court does not appear by Judge Bechtel's opinion or by proof before the Master now, and cannot be regarded as the ground of the decision of that case. It is not to be supposed that the Court of Schuylkill County meant to commit the solecism of first deciding the case upon its merits against the libellant, and then declaring that it had no jurisdiction to decide it at all. Under these circumstances, the application of the doctrine of *res adjudicata* can hardly be denied, and the report of the Master ought to be approved.

The report is approved and the libel is dismissed at the costs of the libellant.

SHANEMAN vs. WEST READING BORO.

Real Estate—Damages from Change of Grade of Street—Appointment of Viewers—Unauthorized Release by Husband for Wife's Property—Estoppel.

A wife who is the owner of property that was damaged by the relocation of a street is not barred from asking for the appointment of viewers to assess the damages to her property, although the Borough, believing that her husband was the owner, had agreed upon a settlement of the claim and had received a release from the husband upon the Borough's agreement to make certain improvements to the property, which had been substantially completed. The fact that the wife was aware of the work being done and probably had reason to believe that it was being done by the Borough, is not sufficient to constitute an estoppel.

Estoppel—Requirements.

An estoppel can never work in favor of one who is not misled by the fact relied upon as creating it.

Where there is an obligation of inquiry (as it was upon the Borough with respect to the title of the property) whatever information that inquiry diligently pursued would lead the party asserting an estoppel to acquire, is imputed to him.

Knowledge in the party to be estopped is an essential condition of estoppel.

Husband and Wife—Real Estate—Implied Agency of Husband.

There is, touching a wife's property rights, no presumption of agency for her in the husband by virtue of the marital relation. There must be specific authorization.

In the Court of Common Pleas of Berks County.

No. 50 May Term, 1917.

Petition for appointment of viewers.

Robert Grey Bushong and Cyrus G. Derr for plaintiff.

Wm. Abbott Witman, Jr., for defendant.

Opinion by Endlich, P. J., December 22, 1917.—The plaintiff in this case has presented her petition setting forth, among other things, that she is the owner of certain property in the borough of West Reading, that by reason of the relocation of streets and change of grade by the borough her property has been damaged, and that she has been unable to agree with the borough upon the compensation to be paid her,—and praying for the appointment of viewers to assess her damages. The borough has filed an answer to this petition objecting to the proposed proceeding and in effect declaring, as ground of estoppel against the plaintiff, that her husband, representing himself as the owner of the property, agreed in writing to release all damages on condition of the borough's making certain improvements to the property, which condition was substantially performed. Depositions have been taken, from which it appears that he had no authority from his wife to agree to or execute the releases, and that the wife, whilst she was aware of the work being done and probably had reason to think that it was being done by the borough, knew nothing about the attempted release of damages.

Let it be assumed that the objection interposed by the borough, if otherwise sufficient, is competent at this stage of the proceeding in bar of its prosecution. Yet it must be apparent that what is alleged cannot avail to preclude the plaintiff from asking compensation in damages for such injury as she may have sustained. The releases describe the plaintiff's husband as the owner of the property, speak of it as belonging to him, and make no reference at all to the plaintiff's ownership or rights. The borough apparently treated with him as the owner of the property, ignoring the plaintiff altogether, and the plaintiff herself remained in ignorance of what was done. An estoppel can never work in favor of one who is not misled by the act relied upon as creating it: *Woods vs. Wilson*, 37 Pa. 379, 384; *Schwab vs. Edge*, 214 id. 602, 605, and where there is an obligation of inquiry, as there certainly was upon the borough in this instance with respect to the title of the property, whatever information that inquiry, diligently pursued, would lead the party asserting an estoppel to acquire, is imputed to him: *Maul vs. Rider*, 59 Pa. 167; *Jeanes vs. Hizer*, 186 id. 523; *R. R. Co. vs. Pa. Co.*, 222 id. 573. On the other hand, knowledge in the party to be estopped is an essential condition of estoppel: *Lawrence vs. Luhr*, 65 Pa. 236, 240-1; *Putnam vs. Tyler*, 117 id. 570, 587; *Thompson's App.*, 126 id. 367, 373; *Logan vs. Gardner*, 136 id. 588, 600, and there is, touching the wife's property rights, no presumption of agency for her in the husband by virtue of the marital relation: *Shimer vs. Jones*, 47 Pa. 268, 274. There must be specific authorization of him by her in order to act bindingly upon her, or the circumstances must be such as in equity to visit her with knowledge of what was going on and the consequent duty to dissent in limine. Thus, in *Forrester vs. Preston*, 2 Pittsb. R. 298, it was held that the wife's land was bound by a mechanic's lien filed against it in her name as owner, the husband having, with her knowledge and consent, but in his own name, contracted for the erection of a building, she, however, being shown to have made frequent visits to it during the progress of the work, giving directions concerning the same, and selected materials for it. A statement of the facts of the case just cited shows how far those of the present case fall short of what is necessary in order to affect the plaintiff with the action of her husband in the premises. Even though plaintiff was aware that the borough was making the improvements to her property, that circumstance was not notice to her of an abandonment of her entire claim to compensation.

There are some other matters suggested by the answer and depositions which it is unnecessary to discuss, in view of what has already been said. There seems to be no doubt that the plaintiff is entitled to maintain this proceeding, and that it is the

duty of the Court to appoint viewers for that purpose. It may be that what the borough has expended in the way of improving the plaintiff's property will not be lost to it if this proceeding goes on to a conclusion.

And now, Dec. 22, 1917, it is ordered that E. J. Morris, Wm. M. Zechman and Geo. W. Weida are appointed viewers as prayed for in plaintiff's petition.

LAZOS vs. MULL et al.

Partnerships—Equity—Bill for Accounting.

Where a person is still a member of a partnership, or has been forced out by the wrongful conduct of the other partners, he is entitled to ask for an accounting, but where he himself broke the contract of partnership and voluntarily withdrew from it, he has no such right and a bill in equity asking for an accounting will be dismissed.

In the Court of Common Pleas of Berks County: In Equity.

No. 1187 Equity Docket, 1917.

Bill for a partnership accounting.

W. B. Bechtel and Rothermel & Mauger for plaintiff.

Harry J. Dumn for defendants.

Opinion by Endlich, P. J., December 22, 1917.—

I. FINDINGS OF FACT

1.—About August, 1916, the defendant, Sarah K. Mull, purchased the real estate, stock and equipment of a candy manufacturing establishment, and with the defendant, John L. Mull, her husband, and Parris Mull Lazos, plaintiff, entered into a partnership arrangement for the manufacture and sale of candy.

2.—According to the agreement of the parties, the partnership was to continue for 10 years, and \$4,000 were to be contributed to the capital stock by the partners in equal amounts of \$1,333.33 each, the plaintiff to pay in not less than \$300 in cash, the balance of his share to come out of his proportion of the profits.

3.—It was expected by plaintiff and by John L. Mull that the latter and his wife would jointly adopt the plaintiff as their son and heir, and this expectation on the plaintiff's part, encouraged by John L. Mull, operated in a large measure to

induce him to enter into the venture, giving up a position in which he was earning good wages. Sarah K. Mull, however, had not agreed and never did agree to the proposed adoption.

4.—The plaintiff contributed nothing to the partnership in the way of money, now claiming that his consent to his adoption by the defendants was understood to stand in lieu of his share of the contribution otherwise to be made.

5.—Plaintiff took up his residence with the defendants and worked in the business for a few months, his board and lodging being paid out of the partnership funds.

6.—All the parties were inexperienced in the manufacture of candy, and consequently the business was from the beginning unprofitable.

7.—From time to time the plaintiff importuned Sarah K. Mull to proceed with his adoption, but in December, 1916, she finally refused. There were some disagreements between the parties in other particulars, chiefly about the payment of rent to Sarah K. Mull for the occupancy of the building in which the factory was conducted, and about giving plaintiff an interest in the real estate which he desired, and upon her refusal in December, 1916, to agree to the adoption the plaintiff in anger abandoned the enterprise and withdrew from further association with the defendants in it. He is now asking for an accounting at their hands respecting the partnership business and affairs.

II. DISCUSSION

The question presently to be decided is whether the plaintiff has a right to the account he is asking in this proceeding. If he is still a partner in the enterprise started in August, 1916, or if he was forced out of it by wrongful conduct on the part of the defendants, that question is to be answered in the affirmative. If he himself broke the contract of partnership and voluntarily withdrew from it, it is too plain for discussion that he has no standing to ask for an account. If there was a promise by defendants to adopt him, there is no trouble about holding that plaintiff's consent to that adoption was a sufficient consideration for his admission into the partnership without his payment of any money towards the capital of the concern, provided that was agreed to. But a careful examination of the evidence seems to prove very satisfactorily that there was in truth no such arrangement. The proposed adoption of the plaintiff, it is alleged, was to be the joint act of both defendants. There is no direct proof of Sarah K. Mull's ever having committed herself to it, except the statement of plaintiff himself, unqualifiedly contradicted by both defendants. The circumstances support them rather than the plaintiff.

The fact, indeed, that plaintiff's adoption, even if agreed to, was not to stand as the equivalent of his contribution towards the capital of the partnership is indicated by his acceptance of board and lodging as the only return made to him for his services in the business. It would seem, therefore, that plaintiff's contention in this particular, as well as the fact of a promise by Sarah K. Mull to adopt the plaintiff, must, under the evidence, be negatived. Neither does there appear to be any room for reasonable doubt that the causes of his withdrawal from the partnership were, besides the disappointment about his adoption by Sarah K. Mull's refusal, the unprofitableness of the business, and the disagreement about the rent, to which may be added a difference concerning the title to the real estate in which he appears to have been desirous of being given an interest by Sarah K. Mull. The allegation of indecent and immoral behavior on the part of John L. Mull towards the plaintiff as the compelling ground for his withdrawal would be well nigh incredible even if it were not inconsistent with plaintiff's conduct in the case. But it is distinctly inconsistent with his continuing insistence upon his adoption. "That actions speak louder than words is sound law as well as proverbial wisdom." *Graham vs. Dempsey*, 169 Pa. 460, 462. When it comes to considering the adequacy of the grounds stated for his withdrawal from the partnership, it is apparent that the disappointment about his adoption was not a good ground, because the plaintiff had never obtained any promise from Sarah K. Mull herself to adopt him. He chose to act on John L. Mull's expressions of hope and expectation, which are not shown and cannot be presumed to have been binding on Sarah K. Mull: see *Shimer vs. Jones*, 47 Pa. 368, 374. That the unprofitableness of the business and the disagreements about rent, etc., were not a lawful and sufficient ground for his repudiating the contract of partnership, goes without saying.

The conclusion seems inevitable that the contract between the plaintiff and the defendants was, in the first place, not carried out by the plaintiff in the matter of payments to be made by him towards the partnership capital, and that it was, in December, 1916, unequivocally set aside by him when he voluntarily and without competent excuse abandoned the enterprise. It follows that he has now no standing to ask for an accounting at the hands of the defendants, and that the bill must be dismissed at the costs of the plaintiff.

III. CONCLUSIONS

A—There having been no promise on the part of Sarah K. Mull to adopt the plaintiff, his expectation of such adoption cannot be regarded as having become a part of the consideration of the partnership arrangement between the parties

absolving him from any contribution towards the capital of the same.

B—The contract of partnership having been broken and the partnership relation between the parties to this action having been voluntarily abandoned by the plaintiff, he has now no right to an accounting at the hands of the defendants.

C—The plaintiff's bill is to be dismissed at his costs.

And now, Dec. 22, 1917, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

COM' TH, to Use to GHERST, Ex'r, vs. GREGORY and BERKS COUNTY TRUST CO.

Register of Wills—Official Bond—Forfeiture—Granting Letters Testamentary to Non-Resident Without Exacting Bond.

M., domiciled in Massachusetts and doing business in Reading, Pennsylvania, died testate and appointed McCarthy, a resident of Massachusetts, and Gherst, a resident of Reading, as his executors. The will was probated in Massachusetts and ancillary letters were issued to the executors in Reading by Gregory, Register of Wills of Berks County, without his requiring a bond from McCarthy, a non-resident, as stipulated by Act 15 March, 1832, Sec. 16, P. L. 135. Gregory's official bond was for \$30,000, conditioned upon his faithfully executing the duties of his office as Register of Wills. Gherst and McCarthy mismanaged the estate, were subsequently denied commissions and were surcharged \$49,000 by the Orphans' Court, and, McCarthy having been removed as ancillary executor, it was ordered that the surcharge be paid by Gherst and McCarthy to Gherst, executor "for distribution in this estate." It was further ordered that after payment of claims of Pennsylvania creditors the balance should be paid to Gherst and McCarthy, the Massachusetts executors, to be distributed under the order of that court. The surcharge was not paid and suit was brought by Gherst, executor, against Gregory and the Trust company, surety on his official bond, to recover \$30,000, the amount of the bond, because of Gregory's failure to exact a bond from McCarthy.

The defendants contended that the letters to McCarthy having been void, the Orphans' Court was without jurisdiction to adjudicate the account of the executor de son tort, and that therefore the defendants in this suit not being parties to the proceeding, were not bound by any decree or adjudication made by the court. Defendants also denied injury on account of the surcharge, and averred that the money complained of as being unpaid is in the hands of the Massachusetts executors subject to an accounting in that court. The verdict was for the plaintiffs.

Held, refusing a new trial and judgment n. o. v., that the evidence showed that McCarthy had submitted himself to the jurisdiction of the Orphans' Court; that defendant's affidavit of defense must be held to admit non-payment of the surcharge, and that the estate had suffered injury thereby to the extent of \$49,000.

In the Court of Common Pleas of Berks County.

No. 57 January Term, 1916.

Rule for new trial and for judgment n. o. v.

Jos. R. Dickinson and F. A. Marx for defendants and rules.

W. B. Bechtel and Wm. Kerper Stevens for plaintiff.

Opinion by Wagner, J., January 7, 1918.—The plaintiff brought suit against George R. Gregory, an ex-Register of Wills of Berks County, and the Berks County Trust Company, his surety, whilst Register, upon the allegation that it had suffered injuries in that the defendant, George R. Gregory, issued ancillary letters testamentary to Jere. J. McCarthy, a non-resident, without requiring him to give bond as provided for by Act of Assembly, 15 March 1832, Sec. 16, P. L. 135. The pleadings admit these facts:

First—That George R. Gregory was duly elected and commissioned according to the constitution and laws of Pennsylvania as Register of Wills for the County of Berks for three years to commence on the first Monday of January, 1909.

Second—That George R. Gregory on November 24, 1908, as such Register of Wills-elect, entered into an official bond with the Berks County Trust Company as his surety in the sum of \$30,000. That, inter alia, the condition of the bond was: "That if the said George R. Gregory shall and does faithfully execute the duties of said office * * * then this obligation to be void, or else to be and remain in full force and virtue." That this bond was approved by the proper authorities and entered of record, and that George R. Gregory took possession of the office of Register of Wills on the first Monday of January, 1909.

Third—That Joseph Middleby, domiciled in Massachusetts, and doing business in Pennsylvania, at Reading, Berks County, on May 20, 1911, died testate, appointing Jere. J. McCarthy, a resident of Massachusetts, and Milton A. Gherst, a resident of Pennsylvania, executors of his last will and testament.

Fourth—That the last will and testament of said Joseph Middleby, deceased, was probated in Massachusetts, and afterwards offered for probate in Pennsylvania, to the said George R. Gregory, Register of Wills, who probated same June 10, 1911, and granted ancillary letters testamentary to Milton A. Gherst and Jere. J. McCarthy, without requiring Jere. J. McCarthy, non-inhabitant as aforesaid, to give a bond as required by the Act of Assembly, 15 March 1832, *supra*.

Plaintiff's fifth paragraph of the statement avers that in the adjudication of the account of Milton A. Gherst, his co-executor

declining to join him in filing an account, the Orphans' Court found that said executors had wasted and lost \$49,678.66 in the operation of an automobile plant of the testator, and surcharged them with said amount, and ordered that M. A. Gherst and Jere. J. McCarthy pay this amount to M. A. Gherst, executor, for distribution in said estate. The adjudication was offered in evidence. From said adjudication we have (N. of T., p. 16):

"By the account filed it appears that there is an actual balance in the hands of the accountant of \$17,934.49, in the personal account, and \$10,722.43, in the real account, or a total of \$28,656.92. The accountant asks to be surcharged with the amounts of \$341.56 and \$107.00, for moneys collected and commissions, respectively; and asks for the following credits: \$2,170.95 and \$1,354.81, to correct an error in the account, and for \$314.17—leaving a balance of cash in accountant's hands of \$25,265.55. The difference between this figure and \$73,253.53, the above balance, is the amount of the surcharge against both accountants: *and it is ordered that M. A. Gherst and Jere. J. McCarthy pay this amount, \$47,987.98, to M. A. Gherst, executor, for distribution in this estate.*"

The order referred to is that part of the adjudication just quoted which we have underscored. The non-payment of this order is made the basis for the injury alleged to have been sustained by the plaintiff. There is nothing in the affidavit of defense denying the facts thus stated. What the defendants aver against this allegation of facts is that the Orphans' Court had no jurisdiction over Jere. J. McCarthy to make this order and decree, and a denial of injury on account of the surcharge for the reason that in the adjudication Milton A. Gherst was ordered and directed after distribution to the domestic creditors, to pay to Milton A. Gherst and Jere. J. McCarthy, executors, subject to the direction of the Massachusetts Courts, \$47,733.66. The facts contained in this paragraph must therefore be taken as admitted.

Plaintiff's sixth paragraph of the statement avers that the executors of Joseph Middleby, deceased, have not obeyed the order of the Court in relation to paying said surcharge, which is long overdue and remains unpaid. This is not specifically denied. The affidavit of defense avers that the facts set forth in paragraph six are denied. This bald averment does not meet the requirements of the Practice Act of 1915 to constitute a denial. Defendant further avers that the money complained of as being overdue and unpaid is in the hands of the executors subject to an accounting in the Courts of Massachusetts. This is an evasive answer, and again does not meet the requirements of the Practice Act. How it got into the hands of the executors appointed by the Courts of Massachusetts is not

stated. The fact of non-payment as contained in the sixth paragraph must, therefore, be also taken as admitted.

On April 25, 1916, counsel for plaintiff, by paper filed, suggested the death of M. A. Gherst, executor of Joseph Middleby, and substituted in his place the Colonial Trust Company, of Reading, appointed by the Register of Wills of Berks County ancillary administrator d. b. n. c. t. a. of Joseph Middleby, deceased. On February 24, 1917, defendants presented their petition praying that the substitution thus made be stricken from the record. The rule granted upon this petition was, on April 9, 1917, discharged, and the parties to this suit stand as amended by the substitution. It is clear from the adjudication that the order for payment by M. A. Gherst and Jere. J. McCarthy to M. A. Gherst, executor, is to him as ancillary executor for the reason that at the time this order was made Jere. J. McCarthy had already been removed as ancillary executor by the decree of the Orphans' Court entered January 11, 1913, which decree was affirmed by the Supreme Court in Middleby's Estate, 242 Pa. 39. He had not been removed in Massachusetts as domiciliary executor by the Massachusetts Court. Also for the further reason that the order is to pay for distribution in the estate or portion thereof that was then before the Orphans' Court of Berks County. Only by compliance with this order would M. A. Gherst, the remaining ancillary executor, be enabled to make payment to the parties entitled thereto in accordance with the decree of distribution;—that is, first, to Pennsylvania creditors, and, second, to the domiciliary executors of Massachusetts for accounting there. The suit was brought by the Commonwealth of Pennsylvania to the use of M. A. Gherst, one of the executors of Joseph Middleby, deceased. In view of the aforesaid order for payment, which in paragraph five, of plaintiff's statement, is made one of the grounds upon which this action is based, this must be understood as M. A. Gherst, one of the executors appointed by the Register of Wills of Berks County, who, by the discharge of McCarthy had become the sole Pennsylvania executor. After Gherst's death the Colonial Trust Company was appointed ancillary executor d. b. n. c. t. a. and its substitution in this suit made in accordance with Act of 24 February 1834, Sec. 32. P. L. 79. See also Bradford vs. Bradford, 2 Clark (foot page) 511. There was, therefore, no error, as alleged in defendant's ninth reason for a new trial, in discharging the rule granted upon the petition of defendants to strike off the substitution.

The fourth, fifth, sixth, seventh and eight reasons for a new trial assign as error the admission of records of the Orphans' Court relating to the estate of Joseph Middleby, deceased. These records consist of—

1. The proceedings relating to the discharge of McCarthy as ancillary executor.

2. The adjudication of the first account of Jere. J. McCarthy, and the first and second account of M. A. Gherst, ancillary executor.

3. The proceedings had in the Orphans' Court to compel a compliance with the decree of the court,—that is, the surcharge made in the aforesaid adjudication.

Among the purposes for which these records were offered, as shown on page 3, N. of T., are:

First—To show that McCarthy, one of the executors, submitted himself to the jurisdiction of the Orphans' Court of Berks County,

(a) In accepting ancillary letters testamentary and acting thereunder.

(b) In filing as such ancillary executor an income account.

(c) In resisting the order of his removal by appealing to the Supreme Court.

(d) In uniformly appearing by counsel at every stage of the proceedings in said Orphans' Court.

(e) That the final adjudication embraced a consideration and adjudication of the first McCarthy income account and also the Gherst first and second accounts, in which a surcharge against both Gherst and McCarthy as ancillary executors was made.

Second—To show the devastavit of McCarthy.

Third—To show the appearance of Gregory, one of the defendants, in such proceedings in the Orphans' Court. These proceedings all eventuating in the decree of the court which is embodied in the opinion of the court on the final adjudication of the several accounts, in which it is ordered that M. A. Gherst and Jere. J. McCarthy pay \$47,987.98, to M. A. Gherst, executor, for distribution in this estate, which was afterwards increased by the addition of the compensation allowed the accountants, making the surcharge \$49,678.66, instead of the aforesaid amount.

The main objection of the defendants to the admission of these records was that the letters to McCarthy having been void, the Orphans' Court was without jurisdiction to adjudicate any account of the executor de son tort, as McCarthy was, and that therefore the defendants in this suit, not being parties to the proceeding, were not bound by any decree or adjudication made by the court. This same question of jurisdiction was also raised

by counsel for McCarthy at the time of the adjudication, and was thus disposed of by the court in the following language (N. of T., pp. 18, 19):

"Aside from the fact that when he obtained these letters he acted upon them and therefore cannot take advantage of his own wrong (see Delbert's Appeal No. 2 (1877), 83 Pa. 468, 474, *semble*), this court has already exercised jurisdiction over him, and that jurisdiction has been upheld by the Supreme Court in McCarthy's Appeal (1913), 242 Pa. 39, and consequently the question of jurisdiction has already been passed upon."

Even if this question of jurisdiction thus disposed of at the time of the adjudication can in this proceeding be raised, we are compelled to come to the same conclusion that the Orphans' Court came to upon the facts then before that court, as is evidenced by the aforesaid records of the court which were admitted in evidence subject to defendants' exceptions. We have these facts: McCarthy obtained ancillary letters and acted upon them from the date of their issuance on June 10, 1911, until the date of the decree entered for his discharge by the Orphans' Court, to wit, January 11, 1913. In these proceedings had for his discharge, McCarthy filed his answer (N. of T., pp. 50, 51, 52). In this answer to the Orphans' Court, upon the petition for his discharge, he admits that he, on June 10, 1911, was appointed ancillary executor of the will of Joseph Middleby, deceased, and that up to March, 1912, he and M. A. Gherst conducted the business of manufacturing automobiles at the factory in Reading, Pa., which factory belonged to the late Joseph Middleby. Also that from March 1, 1912, to the date of his answer he conducted said business in accordance with the directions and the spirit of said will of Joseph Middleby, deceased; that he filed an account which would be a good account in accord with the Massachusetts probate practice; that said account was filed in good faith, and that the respondent is ready and willing to file an extended account or an account which may be in accordance with Pennsylvania practice as soon as he is in possession of the requisite data.

After the hearing had upon the petition for his discharge and answer thereon, the Orphans' Court, on January 11, 1913, entered a decree that "Jeremiah J. McCarthy be dismissed as ancillary executor of the estate of said Joseph Middleby, and that he file an account of any assets of the estate of said decedent in his hands, and not heretofore accounted for." From this order McCarthy appealed to the Supreme Court. The aforesaid decree was affirmed in Middleby's Estate, McCarthy's Appeal, 242 Pa. 39. One of the questions there raised was the jurisdiction of the Court over McCarthy, as is shown by the opinion where we have (p. 42): "He was, as the Court below correctly said in denying the motion for a commission,

a party to the record, and, for the purpose of the estate, within the jurisdiction of the Court." In determining this the Supreme Court had knowledge that the letters ancillary granted to McCarthy had been granted on the part of the Register of Wills of this county without bond filed, as is shown by appellee's paper-book filed in said case, on p. 1, where in the Counter-Statement and Argument of Appellee before the Supreme Court, we have "when ancillary letters testamentary were granted to him jointly with Milton A. Gherst, his co-executor, * * * no bond was filed by the said Jeremiah J. McCarthy, and under the act of March 15, 1832, Section 27, P. L. 139, the granting of letters to McCarthy is void."

The decree entered by the Orphans' Court on January 11, 1913, not only ordered that Jere J. McCarthy be dismissed as ancillary executor, but also that he file an account of any assets outstanding in his hands and not heretofore accounted for. In that proceeding he submitted himself to the jurisdiction of the Orphans' Court not merely in the matter of his discharge, but for all purposes incidental thereto and necessary to the conservation of the estate that had come into his hands in acting as ancillary executor. In the Appeal of the Odd Fellows Savings Bank, 123 Pa. 356, on page 365, Mr. Justice Paxson says: "This equitable jurisdiction having attached, it was sufficient to embrace every relief necessary for a full disposition of the case: Winton's Appeal, 97 Pa. 385; McGowin vs. Remington, 12 Pa. 63; Souder's Appeal, 57 Pa. 498. When a cause is once within the grasp of a court of equity, or a court lawfully exercising equity powers, it has no need to call in the aid of a court of law. Its process is plastic, and its power is only limited by the necessities of the case, and by its duty to administer equity in accordance with established rules. In such case it needs no other court to finish its work." See also Carney vs. Merchants' Union Trust Company, 252 Pa. 381, at pp. 385, 386. Under the facts of this case as shown by these records offered in evidence, the Orphans' Court clearly had jurisdiction over McCarthy when it made the order charging him and Gherst with waste and mismanagement in the estate in which they were acting as ancillary executors, and surcharging them with the amount thereof. The records objected to showed that McCarthy had submitted himself to the jurisdiction of the Orphans' Court and the order of the court made in accordance with such submission. There was, therefore, no error in their admission.

The further purpose was to show the efforts made to collect the money so surcharged against McCarthy and Gherst. It was not necessary to offer this in evidence for that reason, because, as we have already stated, in considering the sixth paragraph of plaintiff's statement and the affidavit of defense

thereto, the fact of non-payment must be taken as admitted as alleged in said sixth paragraph. Its admission consequently worked no error.

Defendants contend that no person has suffered damage and that therefore the surety of the Register, the Berks County Trust Company, is not liable under the provision of Section 27, Act of 1832, *supra*, which provides "and the Register granting the same, and his sureties, shall be liable to pay all damages which shall accrue to any person by reason thereof." Had the Register exacted a bond from McCarthy as he was required to do by the Act of Assembly, upon the failure of McCarthy upon his discharge and the adjudication of his account to pay over to his successor in office the sums so adjudicated against him, his successor could have maintained an action upon the bond: *Hare vs. O'Brien*, 233 Pa. 330, 335, even though the surety was not a party to the proceeding: 18 Cyc. 1273 (F); *Yung's Estate*, 199 Pa. 35; *Com. vs. Ruhl*, 199 Pa. 40; *Garber vs. The Commonwealth*, 7 Pa. 265. We have, therefore, ancillary letters granted by the Register to McCarthy. By reason of these letters thus granted, McCarthy was enabled to act as ancillary executor from June 10, 1911, to January 11, 1913, and thereby obtained possession of the assets of the estate. During this time he and his co-executor wasted and mismanaged the estate to the extent of more than \$49,000. This amount has not by them been paid to the estate, and there is no bond to sue upon for this non-payment. That is, the estate has been damaged to the extent of \$49,000 by the granting of the Letters by the Register without exacting a bond. Under these facts it can hardly be said that the estate has not been damaged by the illegal act of the Register.

Defendants also claim that no damage has been done to the estate in that by operation of law the amount surcharged against Gherst and McCarthy, and ordered to be paid to M. A. Gherst, executor, and by him then to be paid to M. A. Gherst and Jere J. McCarthy, executors, subject to the Massachusetts Courts, must be presumed to be in the hands of M. A. Gherst and Jere J. McCarthy, domiciliary executors, upon the principle contained in *Commonwealth vs. Messinger, et al.*, 237 Pa. 1, on page 7: "'When an executor or administrator also occupies some other character with regard to the estate, such as guardian or trustee, it will be presumed that the property in his hands is held in that capacity in which he ought to receive it, and upon the termination of his duties in one capacity the property is transferred by operation of law to his possession in the other so as to release the sureties on the bond in the former capacity from further liability.'" Defendants claim that because Gherst and McCarthy, against whom as ancillary executors the surcharge was made, are also the domiciliary executors, to whom the amount was ordered

to be paid, that upon the principle just stated this amount must be presumed to have passed to the domiciliary executors. In other words, the contention is that even if Gherst and McCarthy, as ancillary executors, have wasted the estate to the extent of \$49,000, and even if they had given bond in Pennsylvania, or if McCarthy had given bond, as the law required him to do, the order of the court by law would have transferred the money that he had wasted at once into their hands as domiciliary executors, absolving his surety here, but making their surety in Massachusetts liable for the waste committed by them in Pennsylvania, if not accounted for in Massachusetts.

In making this contention upon *Commonwealth vs. Messenger*, *supra*, they have lost sight of the facts and findings therein. In that case the court specifically found that the amounts in question had come into the hands of Oliver H. Meyers, trustee under the last will and testament of Michael Meyers, deceased, to be applied to the purposes of the trust, as set forth in said last will and testament. The breach sued upon as contained in plaintiff's statement was that "Oliver H. Meyers did not faithfully execute the trust he accepted under the last will and testament of the said Michael Meyers, and did not properly apply all the moneys received by him as trustee as aforesaid to the said trust, but diverted the same to his own use." The bond sued upon was not a bond that he had given in his capacity as trustee under the will of Michael Meyers, but as trustee to sell real estate under an order of the Orphans' Court. Of course, upon these findings and plaintiff's statement, the surety, upon an order of the Orphans' Court to sell as trustee, could not be held for acts that the court had specifically found the trustee had committed, and the plaintiff had declared upon, not as such trustee under the Orphans' Court to sell, but as trustee under the will of Michael Meyers. The principle that applies to the case under consideration is that contained on p. 7, where we have: "It is in some cases difficult to say when the transfer of possession from one capacity to another takes place, but it is well settled that when property has been received in one capacity the change in order to shift the responsibility of the sureties, must be evidenced by some overt act or express election to hold the property in the other capacity." 18 Cyc. 1258; *Seegar vs. State*, 6 Haris & Johnson (Md.) 162; *Newcomb vs. Williams*, 50 Mass. 525; *Simpson's App.*, 18 W. N. C. 175." Immediately following this the Court says: "We are relieved of all inquiry on this point by the clear admission in the pleadings and the finding of the auditor to the effect that Oliver H. Meyers as trustee under the will received the full sum that the trustee

under appointment of the court received on the sale of the real estate. But even were it otherwise, and the question were to be resolved by the evidence in the case, the mere fact that for a period of twelve years following the execution of the order of sale, Mrs. Moré received regularly from Oliver H. Meyers the interest on the money derived from the sale of the real estate, would be most persuasive of an understanding on the part of both, that the money had passed out of the hands of the trustee to sell and into the custody of the trustee under the will, the only party to whom it could be paid." In the present case we have the distinct finding by the Orphans' Court of Berks County that the money Gherst and McCarthy had received, and the estate they had mismanaged was in their capacity as ancillary executors. That is, the responsibility is placed upon them as such, and, therefore, had they given bond here their sureties here as ancillary executors would have been held liable. It is admitted by the pleadings, as we have several times stated, that this money has never actually been paid to Gherst by the two ancillary executors. We have also the presumption of payment rebutted by the admitted fact of non-payment.

Skeer's Estate, 249 Pa. 288, has also been cited by defendants' counsel as authority for this contention of presumed payment. The principle as there applied must again be taken in connection with the admitted facts of the case,—that is, that Linderman received the money as ancillary administrator; was directed to pay it over to the domiciliary administratrix from whom he held a general power of attorney to collect and receive all funds due from Linderman & Skeer, and that he had filed his account stating that he had obeyed the order of the court. Upon this the court, on p. 293, said: "Having filed his account stating that he had obeyed the order of the court he will subsequently be presumed to have held it in the only capacity he could hold it—as agent of the accountant." There is no merit in defendants' contention that there is a presumed payment and that consequently the estate has not suffered any damage by the action of the Register of Wills in granting ancillary letters testamentary to McCarthy, a non-resident, without requiring from him a bond.

Rules for new trial and judgment n. o. v. are discharged.

WEBER'S ESTATE (NO. 2).**Wills—Construction—Inconsistent Provisions.**

Testatrix, by her will directed that two factories owned by her should be operated by three of her sons, among whom the profits should be equally divided, and who should pay to her other children a monthly sum as rental. She further provided that if Harry, one of the sons, should wish to withdraw from the "firm," the other two sons operating the business should have the first right to purchase his share at its appraised value. A subsequent clause stipulated that the three sons should each receive \$15 per week for their labor out of the profits of the factories. The three sons operated the factories and subsequently Harry purchased the interest of the other two, put in additional capital and operated the business as his own. Two of the other heirs asked for an order upon him to account to them for the profits of the business, claiming that he was merely trustee for the heirs. **Held:** that the provision of the will permitting Harry to sell his share extended by implication to his two brothers; that although the provision for paying salaries out of profits seems inconsistent with the previous disposition of profits to the same persons, yet the Court will not go so far as to conclude from what at best is an inconsistency, that a trust relation between the sons and the estate was established covering the business.

In the Orphans' Court of Berks County.

Exceptions to decree.

Cyrus G. Derr and Walter B. Freed for exceptants.

John B. Stevens, contra.

Opinion by Schaeffer, P. J., January 9, 1917.—Twelve exceptions have been taken to the adjudication filed November 3, 1917, of the questions raised by this proceeding. All of them are to the effect that error has been committed in construing this will to have given Harry Weber an absolute interest in the business in question, and, consequently, in the Court's refusal also to oust him from possession. Being in substance the contentions advanced originally in the petition, they have already been considered by the Court. Further careful consideration of them has failed to convince the Court that the conclusion reached in its opinion is either unjust or erroneous.

It is conceded that the will leaves much to be desired to enable one to conclude with absolute certainty what testatrix intended with regard to this business. There are instances where she has failed to say enough to make her intention clear, others where she might have left some things unsaid to avoid apparent inconsistencies. Exceptants specifically direct our attention to two such instances. One of them, of the former sort, is the permission she accorded Harry C. Weber, in the event of his withdrawal from the firm, of realizing on his share, without, in so many words, extending this permission to his two brothers, James and Daniel. The other, of the latter sort, is that provision of the will fixing salaries of

\$15.00 a week to Harry and his two brothers after having already given him all the profits realized from the operation of the business. On this latter provision exceptants place great weight as tending to put Harry Weber and his brothers in the position of trustees. To our finding that the three brothers were given "the privilege of buying each other out" exceptants do not assent.

We have found that the provision permitting Harry Weber to dispose of his share extended also to his brothers, James and Daniel. Specifically, the language of the will does not include the latter two in this permission, but by fair implication we think it does. Like Harry, his two brothers, in the succeeding paragraphs, were given more than a passing interest in this business. It did not cease with their deaths. Their shares of the profits were to pass, in such event, to their widows or children. James' and Daniel's severance from this business by death, in other words, did not extinguish their interests; they were such interests as passed to their families. But while all were still living testatrix had in mind that the business might center in the hands of a single one of these three sons. Otherwise, how explain this language: "If at any time my three sons . . . or the survivors or survivor of them declined to continue the manufacturing business," etc. Now, had either of Harry's brothers decided to leave the firm, what was to become of such one's interest in it? Exceptants would hardly contend that, with nothing paid for it, it would have passed to the survivors of the firm. If that were true, Harry Weber might today be enjoying all the profits from this business without having paid a cent for his brothers' shares. Such, in the opinion of the Court, was not testatrix's intention. It was rather to give all three boys the right to sell their interests to each other; and in naming Harry she merely marked out the procedure to be followed in making the sale—"by an honest appraisement."

The direction for the payment of salaries is not easily explained. At best, it is inconsistent with the previous disposition of profits to those who were to receive the salaries. Testatrix's actual intention with regard to it, therefore, can only be conjectured. It may be that she meant to suggest \$15.00 per week salary for each of those running the business between profit-sharing periods. Or it may be that, having in mind an equal division of profits, she attempted to anticipate a demand of one of the sons for higher salary than the others, which might have defeated her wish. It is impossible to say what she meant for a certainty. But the matter is not vital. Having given all the profits to those who ran the business, testatrix's subsequent direction to pay salaries to the same persons was unimportant, since the salaries had to come out of

the profits anyway. Certainly the Court would not go so far as to conclude from what at best is an inconsistency, that a trust relation between these sons and the estate was established, which covered this business.

These two are the principal points raised at the argument on the exceptions. They have been argued with much force, and while at first blush they seem strongly to support exceptants' contention, the Court, on a careful re-reading of the will, is convinced that to concede them the importance exceptants attach to them, would be to defeat testatrix's general intention to give to Harry Weber and his two brothers absolutely the business in question in these proceedings, which, as a matter of fact, depended for its continued existence, growth and development upon their own individual efforts and capital.

The exceptions, therefore, are dismissed.

BELL vs. JACOBS.

Practice—Trial—Charge of the Court—Points for Charge.

A point for charge which assumes a fact in dispute cannot be affirmed, although other portions of the point may not be objectionable. In order to avail, a point must be capable of a simple affirmation without qualification. The Court is not called upon to take the good part of the request from the bad and to charge the good.

It is not error to refuse a point asking the Court to charge that "if the jury believe that the defendant's automobile was not, at the time of the accident, being operated or controlled by the defendant, the verdict must be for the defendant;" where there was no evidence negating its control by defendant. The submission of a question of fact to the jury without evidence is necessarily error.

Contributory Negligence—Evidence—Question for Jury.

In a damage case arising out of a collision between a motorcycle and an automobile, the defendant, by close measurements and calculations based upon the testimony of witnesses as to the location of the automobile before and after the collision, sought to show that plaintiff's decedent had room enough to pass the automobile in safety and that his unsteady driving and failure to take advantage of the opportunities were responsible for his injury. **Held:** that these matters were for the jury on the question whether he exercised proper care or not, and that they did not furnish such conclusive proof of his improper management of the motorcycle as to warrant the Court in pronouncing it, as a matter of law, contributory negligence.

City Ordinances—Traffic Rules—Automobile Act 7 July, 1913, P. L. 672—Conflict.

A city traffic ordinance requiring all vehicles to keep to the right of the centre of the street in the direction in which they are going and directing how turns into crossing streets shall be made, is not in conflict with the Automobile Act of 7 July, 1913, P. L. 672, which provides that "no city . . . shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act."

Evidence—Rebuttal—Admissibility.

Evidence by plaintiff in rebuttal was admitted to show the perfect condition of the motorcycle at the time of the collision by proof of its condition on the day before and immediately after the accident. There had been evidence by the defense from which a defective condition might possibly have been inferred by the jury. **Held:** no error.

Presence of Plaintiff's Children at Trial—Possible Harmful Influence on Jury.

The presence of plaintiff's children in the court room at the trial cannot be held to have been prejudicial to defendant, or to entitle him to a new trial because of the harmful influence possibly exerted upon the jury, where there is nothing to show that their presence had any effect upon the jury. If their mere presence was objectionable to defendant it would have been competent for him to ask for relief at the time. Having chosen to remain silent, it is too late to raise such an objection on mere supposition.

Impeaching Credibility of Witness After Trial—After-Discovered Evidence—New Trial.

Defendant asked for a new trial on the ground that one of defendant's principal witnesses had, after trial, admitted in writing that he had been offered money by some one to testify as he did, and that his testimony was incorrect in certain particulars. Depositions were taken by both sides, and defendant contended that the matter cast such a degree of suspicion on plaintiff's case as to require the setting aside of the verdict. The important part of what he testified to at the trial had been also given in evidence by another witness whose credibility was not impeached, and no attempt at corruption was brought home to anyone connected with the case. **Held:** that it must be considered an effort to impeach, on the ground of after-discovered matter, the credibility of a witness, which is ordinarily not enough to warrant the granting of a new trial.

After-Discovered Evidence—Requisites for Granting New Trial.

To justify the setting aside of a verdict on the ground of newly-discovered testimony, the latter must be such that on a re-trial the jury not only might be induced by it to give a different verdict, but that it would require them to do so. Even the proven perjury of a witness may not necessarily in itself be ground for interference with the verdict, though not discovered until after the trial.

In the Court of Common Pleas of Berks County.

No. 30 November Term, 1916.

Rules for new trial and for judgment n. o. v.

Oliver M. Wolff and Cyrus G. Derr for defendant and rules.

William Kerper Stevens and George Eves for plaintiff.

Opinion by Endlich, P. J., January 14, 1918.—This is an action by a widow to recover damages for the death of her husband. The defendant, the owner of an automobile, conceiving it to be out of order, engaged a repairsman to examine it. The repairsman came to the defendant's garage, and together the two took the car out to see by a test of it on the road what was wrong with it, the repairsman operating the automobile. Going east on Spring street on a down grade, presumably intent on observing the behavior of the machine,

they reached a point some little distance west of the subway when there was a collision between defendant's automobile and a motorcycle operated by the plaintiff's husband, who was going in the opposite direction, and who was killed. The trial resulted in a verdict for the plaintiff, and the defendant is now here asking for a new trial as well as for judgment non obstante veredicto. Quite a number of reasons have been filed, whose bearing upon the respective rules is sufficiently apparent, and which may be considered in the order in which they stand upon the record. Except as regards the refusal of certain points of the defendant, there is no complaint of the charge. Neither is there any criticism of the amount of the verdict, if the plaintiff is entitled to any.

1. It is asserted that the Court erred in not affirming the first point submitted by defendant, to wit,—

"If the jury believe that the defendant's automobile was, at the time of the accident, on the south side of Spring street, the verdict must be for the defendant."

In answer to this assertion, it is enough to note that this point ignores the duty resting upon the defendant to exercise reasonable caution, no matter on which side of the street he may have been traveling.

2. The defendant's second point was as follows:—

"If the jury believe that the defendant's automobile at the time of the accident was on the north side of Spring street, there being no testimony of any obstacle which would have prevented the plaintiff's husband seeing the automobile, it must be assumed that he saw it, and it was his duty to avoid it if reasonably possible, and unless the jury can find from the evidence some reasonable way of accounting for and excusing the plaintiff's husband for guiding or allowing his motorcycle to run into the defendant's automobile, the verdict must be for the defendant."

Its refusal does not appear to have been error, because it assumes that the decedent with his motorcycle ran into the defendant's automobile. Which ran into the other was a disputed issue in the case, there being evidence on both sides; and a point assuming a fact in dispute cannot be affirmed: *Brunner vs. Tel. Co.*, 151 Pa. 447, 453, although other portions of the point may not be objectionable. In order to avail, a point must be capable of a simple affirmance without qualification: *Whitmire vs. Montgomery*, 165 Pa. 253, 261 (re-affirmed in *Sutton vs. R. R. Co.*, 214 id. 274, 279); *Schweitzer vs. Williams*, 43 Pa. Super. Ct. 202. In the language of *Neeb vs. Hope*, 111 Pa. 145, 155, the Court is not called upon "to take the good part of the request from the bad, and to charge the good."

3. *Mutatis mutandis*, the same is to be said of the refusal to affirm the defendant's third point, to wit,—

"It was the duty of the plaintiff's husband to see and take notice of what was before him, and to operate his motorcycle at a reasonable rate of speed, and to keep control of it, and his running into a plainly visible object, like the defendant's automobile, being unexplained, the verdict must be for the defendant."

4. The defendant's seventh point asks the Court to charge that—

"If the jury believe that the defendant's automobile was not, at the time of the accident, being operated or controlled by the defendant, the verdict must be for the defendant."

It seems plain that the question whether the automobile was or was not "operated" by the defendant himself is immaterial if the defendant controlled its operation by the repairsman. The point in the disjunctive therefore is broader than could properly be affirmed. On the subject of the control of the automobile by the defendant, it is to be remembered that there is no evidence negating it; and the submission of a question of fact to the jury without evidence is necessarily error: *Egbert vs. Payne*, 99 Pa. 239, 244. Indeed, it would seem that the presence of the owner of the automobile should raise a presumption of his power to control it, whether he chooses to exercise that power or not: see *Crawford vs. McElhinney*, (Ia.) 154 N. W. 310. In *Hardie vs. Barrett*, 257 Pa. 42, 46, the rule is said to be well established that, in the case of a hired vehicle, when possible dangers arising out of the negligent operation of it are manifest to the hirer, (i. e., for the time being the owner), who is riding in it and has any adequate opportunity to control the situation, if he sits by without protest, he will be held guilty of negligence; that is to say, that whilst the negligence of the driver may not ordinarily be imputed to the passenger, the latter is fixed with his own negligence when he joins the former in testing manifest perils. Nor is it without significance that the repairsman, having started from defendant's garage, had not yet taken the automobile over for the purpose of fixing it. He was still, to all intents and purposes, acting for the defendant, the owner of the automobile, and as his employee.

5. So far as the question of defendant's negligence is concerned, it requires no discussion to show that upon the plaintiff's evidence that question was in the case as one for the jury to pass upon. But in the defendant's eighth point he asked for binding instructions in his favor, grounding that request upon the alleged contributory negligence of the plain-

tiff's husband. By close measurements and calculations based upon the testimony of witnesses as to the location of the automobile before and after the collision, it is sought to show that the decedent had room enough to pass the automobile in safety; that, the accident occurring in broad daylight, he had the automobile in plain view; and that his unsteady driving of the motorcycle and his failure to take advantage of the opportunities he had of avoiding the automobile were responsible for his injury. All these matters were for the consideration of the jury on the question whether he exercised proper care or not, and that question was submitted to the jury in the charge. It cannot be maintained that they furnished such conclusive proof of his improper management of the motorcycle as to warrant the Court in pronouncing it, as a matter of law, contributory negligence barring a recovery by the plaintiff. In this connection it may be pertinent to refer to *Bedell vs. Keller*, 17 Lacka. 55, as a well considered precedent for the submission of a case to the jury on a state of facts in its essential features bearing a strong resemblance to the present one. It would seem that there was no error in the refusal of the defendant's eighth point.

6. The plaintiff offered in evidence a traffic ordinance of the city of Reading, with particular reference to sec. 3 thereof, which provides that—

"All vehicles shall keep to the right of the centre of the street in the direction in which they are going, except within 100 feet of the starting or stopping point of such vehicles. In turning corners to the right, all vehicles shall keep to the right of the centre of the street. In turning corners to the left, they shall, before turning, pass to the right of the centre of the intersection of the two streets."

This offer was objected to by the defendant on various grounds, among others that it is in conflict with the Automobile Act of 7 July 1913, P. L. 672, and that the city has no right to make a regulation of that kind applicable to streets generally. No doubt, in the absence of any regulation as to the use of city streets, a person may drive in either direction on either side of the street, having care to turn out to the right: see *Brooks vs. Thomas*, 17 Phila. 45. But under modern and existing traffic conditions it would be a dangerous doctrine to deny to the city the power to provide as in sec. 3 of this ordinance. *Argumentum ab inconvenienti plurimum valet in lege*. As for a conflict between that provision and the Act of 1913, special reliance is placed by the defendant upon sec. 13,—

"When overtaken by any other vehicle legally traveling at a greater speed, the operator or driver of any motor vehicle, when

signaled to do so, shall turn reasonably to the right of the centre of the highway, allowing the other vehicle free passage to the left."

This section, it is urged, impliedly declares the right of the driver of an automobile to travel on the left of the highway, reasonably turning to the right when signaled to do so by another vehicle traveling at greater speed and desiring to pass. Yet it seems clear enough that such an implication is extremely remote, and that *prima facie* there can scarcely be any conflict between an ordinance requiring all vehicles to keep to the right and a statutory provision requiring a vehicle overtaken by another and signaled to give way to turn out to the right. It follows that sec. 15 of the act, which enacts that—

"No city, county, borough, incorporated town, or township shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act,"—is not effectual to avoid the provision of the ordinance. Nor was that provision offered or admitted in evidence as conclusive in the sense that its disregard would in itself constitute negligence, (as intimated in *Johnson vs. Heitman*, (Wash.) 153 Pac. 331), but simply as a circumstance in the case bearing upon the question of the propriety of the defendant's management of the automobile.

7. In rebuttal, the plaintiff offered to show the perfect condition of the motorcycle at the time of the collision by proof of its condition on the day before and immediately after the accident. The defendant objected that this was not rebuttal, and now argues that it was error to admit the testimony over his objection. There was some evidence on the part of the defence from which a defective condition of the motorcycle might possibly have been inferred by the jury, and to overcome that inference it would seem that the testimony was properly admitted when it was.

8. The defendant further complains that the presence in the court room of the plaintiff's children was prejudicial to him, and that because of harmful influence possibly exerted by it upon the jury the verdict ought to be set aside. There is, however, nothing to show that the presence of the children had any effect at all upon the jury or was even known to it. There was no exhibition of the children in the view of the jury, and if their mere presence was objectionable it would have been competent for the defendant to ask for relief at the time. Having chosen to remain silent when it was his privilege to speak, it is now, on familiar principles, too late to raise this objection upon the mere supposition, unsupported by anything else, that there may have been harm done to the defendant in this particular.

9. One of the two witnesses on the part of the plaintiff who testified directly that the defendant's automobile ran into the

plaintiff's motorcycle was a man whose behavior on the stand was such as to call for an admonition from the Court. He had been a witness at the Coroner's inquest, and on cross-examination he was asked whether he had not there testified in a certain manner. He admitted, with explanation, some parts of his testimony before the Coroner when confronted with them, but denied others. The defendant now alleges that after the trial the witness stated, orally and in writing, that his testimony before the Coroner was correct, but that he was offered money by somebody to testify at the trial as he did. Depositions have been taken for the purpose of establishing this allegation, which on the other side is met by testimony denying certain parts of the alleged oral statements and averring that what the witness said and signed he said and signed under the influence of liquor and upon the promise of money in behalf of the defendant for discrediting his own testimony at the trial. It is contended that this matter casts such a degree of suspicion upon the plaintiff's case as in justice to the defendant to require the setting aside of the verdict. If this witness's testimony were the only testimony directly asserting that the automobile ran into the motorcycle, and if an attempt at corruption were brought home to any one connected with the case, or acting with authority, in the interest of the plaintiff, this contention could perhaps hardly be overcome. As it is, however, it comes down to an effort to impeach, on the ground of after-discovered matter, the credibility of a witness who was examined and testified at the trial; and it is well settled that ordinarily that is not enough to warrant the granting of a new trial. Nor in this instance does the weight of what is alleged size up to the rule laid down in *Com. vs. Flanagan*, 7 W. & S. 415, that to justify the setting aside of a verdict on the ground of newly discovered testimony, the latter must be such that on a retrial the jury not only might be induced by it to give a different verdict, but that it would require them to do so. Even the proven perjury of a witness may not necessarily in itself be ground for interfering with the verdict, though not discovered until after the trial: *Shanahan vs. Ins. Co.*, 6 Pa. Super. Ct. 65, 71. And in this case it is to be observed that a comparison of the testimony of the witness before the Coroner and at the trial, in the light of the explanations that he undertakes to give, shows that there is really very little substantial discrepancy, if any, between the two. It is not conceived that the jury can have attached much weight to the testimony of the witness here in question, and the important part of what he testified appears, as already indicated, by the testimony of another witness whose credibility has not been impeached.

What has been said seems to cover briefly every ground assigned in support of either of the applications made by the defendant and now under consideration. The result is the conclusion

that the case was one for the jury and not for binding instructions,—that hence there is no room for judgment non obstante veredicto,—and that there is no adequate reason for the disturbance of the verdict. Therefore,—

The rules to show cause are discharged.

SNYDER vs. REICHART CLEANING & DYEING CO. et al. (No. 2).

**Corporations—Fire Insurance—Payment of Premium by President—
Fire Loss—Right to Insurance Money.**

In May, 1914, policies of insurance held by the R. Company upon its property expired. Renewals were made out by the insurance agency and delivered to Charles Reichart, president of the company. The company was without funds to pay for the renewals which remained unpaid for but uncanceled and in force until June 20, 1914, when Charles Reichart, with a view to the protection of his and his son's claims against the company, paid the premiums and had the policies marked "Loss, if any, payable to Charles Reichart and Isaac Reichart, judgment creditors as their interest may appear." This was done without the knowledge or consent of the board of directors. A fire destroyed the property and Reichart collected the insurance. **Held:** that the transaction was a taking out on June 20, of insurance on the company's property by Charles Reichart for the benefit of himself and his son, which the company had no claim upon, except in so far as there may be a surplus in Reichart's hands over and above their just claims against the company.

In the Court of Common Pleas of Berks County: In Equity.

No. 1191 Equity Docket, 1917.

Exceptions by plaintiff to decision.

Randolph Stauffer for plaintiff and exceptions.

Snyder, Zieber & Snyder and Ira P. Rothermel for Reichart et al.

Oliver M. Wolff for Reichart Cleaning & Dyeing Co.

Opinion by Endlich, P. J., January 26, 1918.—To the decision rendered in this case on Nov. 5, 1917, the plaintiff has filed exceptions. A careful consideration of them, in the light of the earnest and forceful argument of counsel, has led to the conclusion that a change of the third, the controlling, Finding of Fact is called for. It is not conceived that that finding is wrong or misleading in substance. But in point of form and detail it is fairly open to criticism as being lacking in that accuracy and precision which the plaintiff is entitled to. The finding ought to be amended and restated so as to read as follows:—

"3.—Early in May, 1914, a number of policies of insurance held by the company upon its property expired, aggregating about \$7,000. Renewals were made out by the agency and delivered to Charles Reichart as the company's president. But the company was without funds wherewith to pay the premiums—\$105—for the renewals, which remained unpaid for, but uncanceled and in force. On June 20, 1914, Charles Reichart, with a view to the protection of his and his son's claims against the company, paid the premiums out of his pocket and had the policies marked 'Loss, if any, payable to Charles Reichart and Isaac Reichart, judgment creditors, as their interest may appear.' This was done without the knowledge, authorization or consent of the board of directors of the Reichart Cleaning & Dyeing Co., and there was no subsequent ratification thereof by said board."

That Charles Reichart paid the renewal premiums out of his pocket there seems to be no reason for doubting. The defendants' evidence is to that effect and appears to be uncontradicted. True, it is deposed on the other side that, about the beginning of May, Charles Reichart got into his hands \$102 belonging to the company and said that with it he would renew the policies. But he shows that, instead of so doing, he used the money to pay bills owing by the company, and it is hardly credible that otherwise he would have deferred payment of the premiums until June 20. It cannot, however, be supposed that the policies would have been permitted to remain in force in his possession for the company, unpaid for, three months longer. They were subject to cancellation upon notice, and insurance companies, we know, do not insure gratuitously. On the other hand, there is nothing in the evidence to indicate and no reason to assume that the defendant company was at any time, from the beginning of May to the date of the fire, in a financial condition to pay the renewal premiums. Charles Reichart paid them and thereby made the insurance contracts binding. Under these circumstances, in legal effect as well as for all practical purposes, the transaction was a taking out, on June 20, of insurance on the company's property by Charles Reichart for the benefit of himself and his son, which the insurers might have questioned on the ground of want of insurable interest, but which the defendant company was not concerned with and has no claim upon, except in so far as there may be a surplus in the Reicharts' hands over and above their just claims against the company. The result of the finding as restated would therefore seem to be no different from that which flowed from it as originally put. If this is so, the remaining exceptions demand no rediscussion of the principles involved in the conclusions to which they relate. It may be noted that Conclusion "C"

requires defendants to account with respect to any moneys coming into their hands under the insurance policies or otherwise in connection with the company, and to any moneys advanced by them for the benefit of the latter.

And now, Jan. 26, 1918, it is ordered that the third Finding of Fact in the decision filed Nov. 5, 1917, be amended and restated so as to read as set forth in the foregoing opinion, and that thereupon the exceptions to said decision be dismissed.

HALTZEL vs. PRINTZ AND FULMER.

New Trial—Verdict Against the Weight of the Evidence.

In the suit to recover damages on the ground that defendants had fraudulently induced plaintiff to sell them his stock in a corporation for \$15,000, which was less than its true worth, by false representations that the company had an indebtedness of \$140,000, a verdict in favor of plaintiff will be set aside and a new trial granted on the ground that the verdict was against the weight of the evidence, where the inherent improbability of plaintiff's belief in the alleged representations is manifest from the evidence.

New Trial—Evidence—Verbal Statements—Conflicting Evidence—Question for Jury.

Where there is conflicting evidence as to certain verbal statements made by defendants to plaintiff, alleged to constitute false representations of the indebtedness of a company, the question is for the jury, and the finding that the words used were those as claimed by plaintiff can not be said to be against the weight of the evidence.

In the Court of Common Pleas of Berks County.

No. 123 August Term, 1916.

Rule for new trial and for judgment n. o. v.

Snyder, Zieber & Snyder for defendants and rules.

W. B. Bechtel and Rothermel & Mauger for plaintiff.

Opinion by Wagner, J., January 26, 1918.—During the latter part of 1905 the Prince Furniture Company was formed with \$50,000 preferred stock, and \$50,000 common stock, to do business at Allentown, Pa. On October 31, 1905, Daniel F. Printz, one of the defendants, and Henry S. Haltzel, the plaintiff, entered into an agreement wherein is recited that Printz is the owner of \$50,000 of preferred stock and \$25,000 of common stock, and Haltzel of \$25,000 of the common stock of the Prince Furniture Company. Also, that Henry S. Haltzel is to act as General Manager of the business of the said Prince Furniture Company. In this agreement Printz and Haltzel agree that their holdings of \$50,000 of the common stock of the Company shall be held intact for a period of ten years, unless it is mutually

agreed to sell at an earlier time, and that for mutual protection this stock shall be deposited in a safety deposit box in a vault in a bank or trust company. Daniel F. Printz further agrees to sell to Henry S. Haltzel at any time that Henry S. Haltzel may elect within ten years from date of agreement, \$25,000 of the preferred stock of the Prince Furniture Company at par, plus six per cent. interest, less dividends paid upon said stock. On February 20, 1906, certificates for 125 shares of common stock and 125 shares of preferred stock were issued to Printz. On the same date the same number of shares of common and preferred stock were issued to Fulmer, and 250 shares each of preferred and common stock of Haltzel. These shares were also on this date receipted for by these parties on the respective stock certificate books. Whilst these shares of stock were issued to these respective parties and by them receipted for, the stock was not actually received by them, but kept in a private box for safe-keeping, seemingly to carry out the spirit of the agreement of October 31, 1905, until June 7, 1913, when 200 shares of Haltzel's common stock were taken out of escrow and given as collateral to a Rochester bank for a loan of \$10,000 upon the joint note of Printz and Haltzel. Payment of the common stock was made in 1911 by the Company declaring a stock dividend equal to the amount of the par value of the common stock. The money upon which the Company started its business was furnished by Printz and Fulmer to cover the \$50,000 of preferred stock. The books of the Company show that this money was received in 1905 upon seven notes numbered from one to seven, as follows: August 9, \$5,000; September 12, two notes, one of \$5,000 and another of \$20,000; October 2, \$5,000; October 11, \$5,000; October 19, \$5,000; November 5, \$5,000.

Haltzel testified that he had been the Secretary and Managing Director of the Company, and as such had to look after the affairs of the store at Allentown. He managed the store property, bought and sold merchandise, hired the help, and did that which was necessary to establish trade and business. According to his evidence Printz and Fulmer took care of the finances of the Company, and when necessary, raised money to carry on the business. In October, 1913, Haltzel sold to the defendants his holdings in the company, 250 shares of the common stock, for which he received \$15,000 in cash and certain credits charged against him on the books of the Company. On August 4, 1916, almost three years after he sold out his interest to the defendants, he brought suit against the defendants charging fraud in them in the sale, the basis for which as contended for by the plaintiff, is thus set forth in the sixth, seventh, eighth, and ninth paragraphs of his statement:

"6. On or about October 13, 1913, the defendants entered into a conspiracy to obtain and acquire title to the plaintiff's stock in said furniture company for \$15,000, then and there far below its true value.

"7. In pursuance thereof, the defendants represented to him that said furniture company was indebted to the said Penn National Bank, of Reading, Pa., for accommodation loans to the extent of \$90,000, in support of which they had prepared and then and there exhibited to him in writing a detailed statement thereof, informing him that said bank was then and there demanding immediate payment thereof, and that if he did not accept their offer of \$15,000 for his stock, the furniture company would be ruined and he would get nothing.

"8. Relying in good faith upon the truth of their said representation and said written statement as to the indebtedness of said furniture company to said bank, the plaintiff in terror parted with and transferred his stock in said furniture company to said Printz, one of the defendants, for said proffered sum of \$15,000.

"9. Whereas, in truth and in fact, as the plaintiff has since discovered, said representation of the defendants that said furniture company was indebted to said bank for said sum of \$90,000, was then and there false and fraudulent; said written statement thereof then and there exhibited to him by said defendants was false and fictitious to the extent of \$50,000; said representation and written statement were then and there well-known by the defendants to be false, fraudulent and fictitious; and were then and there made and exhibited to the plaintiff by the defendants with intent to cheat and defraud him out of the major part of the value of his stock in said furniture company and of the financial benefits in a prosperous going business."

It will be seen by this and also by the evidence offered in this case, that the basis of the fraud is an alleged misrepresentation on the part of the defendants that there was a note indebtedness of the Prince Furniture Company to the Penn National Bank of Reading for \$90,000, and that as one of the means of defendants' conspiracy to defraud the plaintiff, they prepared and exhibited to the plaintiff statements, offered in evidence under Exhibits "B," "C," "D," purporting to show an indebtedness to the Penn National Bank on notes for \$90,000. That is, that plaintiff's \$25,000 of common stock of the Prince Furniture Company was purchased in October, 1913, for \$15,000, upon defendants' fraudulent representations, believed and acted upon by plaintiff, that the indebtedness of the Prince Furniture Company consisted of a note indebtedness to the Penn National Bank of \$90,000, and a preferred stock indebtedness of \$50,000, a total of

\$140,000; whereas in fact the total amounted to but \$90,000, being \$40,000 on notes and \$50,000 on preferred stock. The jury returned a verdict for plaintiff for \$9,472.05.

Defendants have filed reasons for a new trial and for judgment n. o. v., and contend in support thereof:

First—The false and fraudulent actions and statements attributed to the defendants on which the suit is based, were in fact never made.

Second—The plaintiff knew exactly and precisely what the facts were in relation to the alleged false and fraudulent statements, he did not believe the alleged false statements and was not deceived by them even if they were made.

Third—The plaintiff suffered no loss.

Counsel for defendants frankly admit that the first of these questions was a matter for the jury upon the evidence submitted, but that the established facts so clearly show that the witnesses must have been mistaken in their evidence as to what was actually said, that a new trial should be granted upon the ground that the jury's finding that the alleged fraudulent representations were made was contrary to the weight of the evidence. With this contention we cannot agree. Plaintiff, and also Mr. Hubbard and Mr. Ruhl, his two counsel in connection with the sale of the stock, testify that the defendants stated that the Penn National Bank held notes of the Prince Furniture Company aggregating \$90,000. They also state that they had the sheets Exhibits "B," "C," and "D," before them upon which the notes were indicated. The defendants deny that this representation was made. They claim that what they said was that the Prince Furniture Company was indebted to them for \$90,000. Under this evidence, even taking into consideration the admitted facts that bear upon what was said, we consider that the question, What actual words were used? as constituting the representations made by the defendants, was clearly for the jury, and that the finding that the words used were those as claimed by plaintiff, is not against the weight of the evidence.

But even if the statement was made by the defendants that the Penn National Bank held notes of the Prince Furniture Company aggregating \$90,000, the question arises, How was that statement understood by the plaintiff? To determine this we must consider the course of dealing of the Prince Furniture Company with reference to the seven notes and their renewals, the proceeds of which represented the payment of the \$50,000 of the preferred stock, as that course of dealing is disclosed by the evidence of the books of the company and the uncontradicted evidence in the case. The materiality and the harmfulness in the representation as alleged

to have been made did not exist in the mere statement that the Penn National Bank held notes against the Prince Furniture Company aggregating \$90,000; but whether or not this statement, together with Exhibits "B," "C," "D," created in the mind of the plaintiff a belief that the Prince Furniture Company had a total indebtedness of \$140,000,—to wit: \$90,000 to the Penn National Bank and \$50,000 on the preferred stock, and induced him to act upon that belief in the sale of his stock. This brings us to the consideration of defendants' second contention—that the plaintiff knew exactly and precisely what the facts were in relation to the alleged false and fraudulent statements.

From the evidence and from the books of the company, among them Exhibit "N" (City Ledger, at pp. 90 and 91), it is shown that the \$50,000 of preferred stock was paid in at different times. Exhibit "N" has the notation (p. 90) "Opening Store," and then shows August 9, 1905, the receipt of \$5,000; September 12, \$5,000 and \$20,000; October 2, \$5,000; October 11, \$5,000; October 19, \$5,000, and November 5, \$5,000, all on notes. This book, together with others, shows that these notes which constituted the payment of \$50,000 of the preferred stock, were renewed from the time of their original discount up to the time of plaintiff's purchase of the stock in October, 1913, by the company paying the discount thereon. That this discount was paid is conclusively shown by the records in the books, by the testimony of Hoge and Block, bookkeepers of the Prince Furniture Company, connected with the office at Allentown, and by the plaintiff, who says a number of times that he knew that the discounts were paid by the Prince Furniture Company by checks to the Penn National Bank from 1906 on to the time of settlement. This is further shown by plaintiff's Exhibit "H," which are the checks issued to the Penn National Bank by the Prince Furniture Company. Fulmer was the Cashier and Printz one of the Directors of this bank. The bookkeepers testify that these checks were made out in the office at Allentown on the Allentown Bank, in which they kept their deposits, sent over to be signed by either Printz or Fulmer—Fulmer was the Treasurer of the furniture company—the amounts then charged against their account in the Allentown Bank, and that this was done in the regular course of business.

Exhibits "E" and "F" are statements of the company which show its assets and liabilities on September 15, 1906. Under "liabilities" in Exhibit "E" we have "Bills Payable, \$91,000." On this statement, in Haltzel's admitted handwriting, we have this explanation of the \$91,000 that was carried as Bills Payable:

"Preferred stock,	\$50,000
Notes Printz & Fulmer,	20,000
Notes Merchants' N. Bank,	20,000
H. S. Haltzel,	1,000"

This amount of \$50,000 was, therefore, already on September 15, 1906, carried under Bills Payable with the knowledge of Haltzel.

Block entered the employ of the Prince Furniture Company about the beginning of September, 1905. He testified that the entry, Exhibit "N" (pp. 90, 91), wherein we have the seven note records, was made by him at the direction of Haltzel. The letter of July 30, 1910, signed by Printz, Haltzel and Fulmer, makes special mention of the notes for the \$50,000. Therein they state to the Audit Company of New York (N. of T., p. 113):

"We think that the inference drawn from your comment relative to the ten personal notes of \$5,000 each is not a fair one, inasmuch as the Preferred Capital Stock of the Company has been fully paid in.

"The facts of the case are that these notes are personal notes secured by collateral other than the Prince Furniture Company's stock. that there is no liability of the Company to this paper and that the interest paid by the Prince Furniture Company on these notes is in lieu of dividend."

With all this record evidence and the testimony thereon of Block, the bookkeeper, it would seem hardly possible that Haltzel, the Secretary of the Company and its Managing Director, who hired the clerks and other employees, was ignorant of the way in which the Prince Furniture Company regarded and had on its books the \$50,000 that had been paid in on notes on the preferred stock, the certificates for half of which had been made out in the name of Haltzel and receipted for by him awaiting the exercise of his option to purchase under the agreement of October 31, 1905.

At the time of the trial much was made of the three discount sheets (Exhibits "B," "C," "D") which the plaintiff stated he first discovered in May, 1913, and which he alleged showed an indebtedness of the Prince Furniture Company to the Penn National Bank of \$90,000. In paragraph seven of the statement, wherein conspiracy is charged against the defendants, plaintiff avers that, in support of this conspiracy alleged to have been entered into on or about October 13, 1913, the defendants "had prepared and then and there exhibited to him in writing a detailed statement thereof," that is, of the \$90,000 alleged to be due to the Penn National Bank. It is most conclusively shown in this case that these statements, alleged to have been prepared by the defendants in support of their conspiracy, were not prepared for this purpose, and were not productions of the year 1913, but existed almost from the beginning of the history of the company. Block testifies that the office at Allentown, in making up the checks for the payment of the discounts (checks similar to Exhibit "H"), frequently made a mistake of fifty cents one way or the other in the amount of discount, and that he then requested Fulmer to send on these lists. He further says (N. of T., p.

172), "I was the one originally asked for this list from the Penn National Bank. * * * They came regularly to the time I was no longer on the books, which was sometime in 1907." When asked whether Haltzel saw this list, he answered "he did." He states that originally he and Haltzel were in the same office room; that Haltzel's secretary, Miss Sheirer, opened all the mail, and that Haltzel answered all the correspondence. J. A. Hoge, plaintiff's witness, testified that he came there some time in July of 1910. He stated that these yellow sheets (Exhibits "B," "C," "D") came to them "in the regular course of business;" that the sheet gave the time for which interest was to be paid, the date, and the amount, and that in accordance therewith they made out checks on the Allentown Bank and sent them to the Penn Bank in Reading. That these three papers ("B," "C," "D") for the years 1911, 1912, and 1913, were by no means all the papers of that character that were sent over, but that like sheets were sent during the entire time that he was there.

Plaintiff testified that Miss Scheirer (N. of T., p. 25) "had nothing to do in the Accounting Department," was his stenographer, his secretary, and looked after his work. She, on December 14, 1910, wrote this letter to Mr. Fulmer (p. 20):

"Dear Mr. Fulmer:—Just as a reminder . . . it is drawing towards the close of the year and we would be pleased to receive from you the customary list covering discounts for the year 1911. Thanking you in advance, beg to remain, Yours truly, M. A. Sheirer, Secretary Mr. Haltzel."

This letter, written by his secretary, is not explained by him. He merely states that he has no particular knowledge of it. If there is anything that is self-evident in this case it is that these lists, alleged to be the foundation or the basis upon which the fraudulent representations were made and prepared in support of defendants' conspiracy, were the open and notorious property of the Prince Furniture Company, at Allentown, kept there without any attempt at concealment or subterfuge, regularly received by them, and known to the clerks in that office. Miss Sheirer's letter is dated December 14, 1910. That Exhibit "D" is the answer to that letter is clear in that as shown thereon it is a list of discounts for the whole of the year of 1911 and the date of the first note due is January 28, 1911. Haltzel's evidence is the only evidence that he did not know of these statements. Even if we did not have the positive testimony of his clerk, Mr. Block, that Haltzel knew of these annual statements that were sent to the company, it is hardly conceivable how these papers, sent to the Allentown office at its request and regularly used by the clerks in the making out of their checks for the discounts, could have escaped the attention of Haltzel, the Managing Director. The only conclusion that the evidence leads us to,

in spite of Haltzel's denial, is that he did have knowledge of these lists, with their import, during the entire time that they were sent to the Allentown office, and, consequently, also in May, 1913. If then Haltzel did know what Exhibits "B," "C," and "D" imported, we fail to see how they raised in his mind the question whether the company's indebtedness was \$90,000 exclusive of the indebtedness of \$50,000 on the preferred stock.

When plaintiff found these papers he testified he went to Printz and to Fulmer and stated that the company did not owe \$90,000 to the Penn National Bank, as first revealed to him by these newly discovered lists, but that the amount was only \$40,000. A number of times he clearly asserts that the contention between them was whether the indebtedness was \$40,000 or \$90,000 to the Penn National Bank. He states that after failure to get a settlement of the difficulties between himself and the defendants, he, some time in July, employed Omri F. Hibbard, an attorney of New York, as his counsel. Hibbard testifies that he came to Reading on August 4, went to the Penn National Bank, and asked Mr. Fulmer, the cashier, what the indebtedness of the Prince Furniture Company was to the Penn National Bank, and that the answer was \$90,000. This answer was given by Fulmer to a total stranger, and before he knew that Hibbard was in any wise connected with Haltzel. If that was the answer, there could not then have been any purpose in Fulmer to deceive this stranger. The answer must be interpreted, in the light of the dealings of the Penn National Bank in the matter of the discounts, to include the \$50,000 which had been carried along from the beginning by the Prince Furniture Company, and upon the notes for which, as the lists "B," "C," and "D" show, Printz and Fulmer were the makers. On August 12 Mr. Hibbard again came to Reading, and associated with him Mr. Ruhl as counsel. They then went to the bank and entered into negotiations with Printz and Fulmer for four hours. Mr. Ruhl, in his testimony, states that he participated very little in the conversation. That it was carried on largely by Mr. Hibbard and Mr. Printz. That he sat by listening. That it was a very long interview and that it lasted from sometime after three o'clock until after seven o'clock. Again on August 28 plaintiff, and his counsel Mr. Hibbard and Mr. Ruhl, met defendants at the bank. On October 13 there was another meeting, and according to Hibbard's testimony he remained in Reading until the 14th and 15th before the matter was finally settled up,—that is, the stock sold. A close examination of the testimony bearing on these negotiations at these different meetings fails to disclose one word of evidence on this controlling question which Haltzel stated was the contention between him and the defendants, that is, whether the Prince Furniture Company owed the Penn National Bank \$90,000, as he tes-

tified defendants claimed, or only \$40,000 as he contended. Mr. Hibbard was asked this question (N. of T., p. 90):

"Isn't that the thing that was in dispute, whether they had a right as creditors to that \$50,000 out of this company?" to which he answered:

"I have no recollection of any such dispute." It seems strange that after the employment of two counsel this very thing which was the main dispute between plaintiff and defendants never came up for consideration to be settled through the assistance of the counsel whom the plaintiff had employed.

In considering the basis of the settlement we find this from plaintiff's counsel, Hibbard, who took the principal part in the negotiations: He was questioned whether Printz and Fulmer had not made a counter-offer for their stock. At first he had no recollection of this, but afterwards he admitted, as his evidence shows (pp. 91, 92), that to the best of his recollection there was a counter offer by the defendants in which defendants agreed to transfer the entire stock of the company to Haltzel upon the payment of the \$90,000 indebtedness and \$6,250, 50 per cent. of Printz's par value of the common stock, Fulmer agreeing to give his common stock for nothing, upon the payment to him of \$45,000, half the indebtedness of the company. Then we have (p. 92):

"Q. They had practically \$90,000 in it, and they said to you that they would sell you 250 shares of this stock, all their interest in it, for \$6,250, if you would pay in addition the \$90,000. Then after that you would have the preferred stock and the common stock, the whole of it. That is right? You would have the whole of that stock. That is right, isn't it? A. Of course."

We have also Haltzel's testimony (pp. 21, 22) which indicates that the settlement was not on the basis of \$140,000 indebtedness, but on \$90,000 indebtedness:

"Q. But they never claimed that the \$50,000 preferred stock which had been paid for, the Company still owed in addition the \$50,000, plus the \$40,000? A. That, Mr. Snyder, I don't think they claimed.

"Q. They claimed that the \$90,000 was an indebtedness of the Prince Furniture Company? A. Yes, sir.

"Q. They claimed that? A. Yes, sir.

"Q. They claimed that \$50,000 of that \$90,000 was their preferred stock which they had paid for? A. I know that.

"Q. That is what you claimed? A. I know.

"Q. And it wasn't represented by them or claimed by them that the indebtedness was \$90,000 plus \$50,000? A. No."

We have, therefore, plaintiff's testimony on cross-examination contradicting his allegation that he sold his stock under the impression that the company owed \$140,000. We

fail to see how the jury could credit plaintiff's evidence that he was induced to sell his stock upon a belief produced by defendants' representations that the indebtedness of the company was \$140,000,—\$90,000 to the bank in notes plus \$50,000 on the preferred stock of the Prince Furniture Company. The inherent improbability of this belief is so manifest from the facts that we are of the opinion that a new trial should be granted on defendants' second contention that the verdict was against the weight of the evidence. We do not consider, however, that there should be entered judgment n. o. v.

Upon the third question, the measure of damages, plaintiff produced witnesses to show from the books of the company its financial standing at the time of the settlement. They then gave their opinion, as persons acquainted with that kind of business, of the value of a share. Evidence was offered against this method of valuation on the part of the defendant. The value of their estimates was for the jury, even though defendants offered evidence to show that this value was much less than that testified to by the witnesses on the part of the plaintiff.

Rule for new trial made absolute; rule for judgment n. o. v. discharged.

WALTER'S ESTATE

Wills—Legacies—Construction—Intention of Testator.

Testator bequeathed to the Reading Trust Co., \$1,000 in trust, the interest to be paid to "the widow of Henry Beyerle, my deceased nephew, for and during and until their youngest child shall have reached the age of 21 years; when the said Reading Trust Co. shall pay over the principal sum of \$1,000 to the three children of Henry Beyerle, deceased, share and share alike; provided, however, that should all of said children have arrived at legal age at the time of my wife's decease, then the said principal sum shall at once be equally divided to and among the said three children of Henry Beyerle." Henry Beyerle had a child, Carrie Geiss, with his first wife from whom he was divorced, and three with his second wife, referred to in the will as the "widow of Henry Beyerle." Carrie Geiss claimed an equal share in the legacy with the three children of the second wife, on the ground that testator intended it to go to all the children as a class, and by mistake he understated the number of children. There was no evidence that claimant ever lived with testator; that any friendly relations existed between them, or that he ever manifested any interest in her; but there was evidence that testator often visited the family of the second wife and the three children and that he did much for them. **Held:** dismissing the claim, that the first object in the construction of a will is the carrying out of the intention of the testator; and that in the light of the language employed in the will and the parol evidence, he did not intend the whole class of children to take and was not mistaken in the number, but used the words "the three" to designate the children of the second wife, who were to be the objects of his bounty.

Wills—Legacy to a Class of Persons—Misstatement of Number.

Where a testator refers to a class of persons, as the objects of his bounty, but, in an attempted enumeration, omits to name one or more of them or in describing them specifies a number which is less than the actual number, the parties omitted may still take and will be included, unless there be something to show the omission was of purpose.

In the Orphans' Court of Berks County.

Claim of Carrie Geiss to participate in legacy.

John K. Hahn for claimant.

John P. Wanner for children of Henry Beyerle, contra.

William J. Rourke for accountant.

Opinion by Schaeffer, P. J., January 29, 1918.—The decedent died on the 5th day of March, 1901,* testate, married, and without issue, having, by his last will and testament, disposed of a part of his estate as follows: Item, "I give and bequeath unto Reading Trust Company, in trust, the sum of one thousand dollars, (\$1,000.00), the interest whereon, less proper charges, shall be paid unto the widow of Henry Beyerle, my deceased nephew, for and during and until their youngest child shall have reached the age of twenty-one (21) years; when the said Reading Trust Company shall pay over the principal sum of one thousand dollars, (\$1,000.00), to the three children of said Henry Beyerle, deceased, share and share alike; provided, however, that should all of said children have arrived at legal age, at the time of my wife's decease, then the said principal sum shall at once be equally divided to and among the said three children of Henry Beyerle, deceased."

The residue of the estate, the testator divided into fifteen parts, and gave three of these parts to "the three children of Henry Beyerle, my deceased nephew."

It appears, that at the time of the making of this will by the testator, and at his death, Henry Beyerle had four children, one with his first wife, from whom he was divorced, and three with his second wife, who is referred to in the will as the "widow of Henry Beyerle," deceased. It will be observed that the testator described the persons, who are to take the \$1,000.00 legacy, as "the three children of Henry Beyerle," without designating the children by name.

Carrie Geiss, the daughter of Henry Beyerle, deceased, by his first marriage, now asks that she be included in the distribution of the \$1,000.00 legacy, with the three children of the second wife, because the testator intended this legacy to go to all of the children of Henry Beyerle as a class, and that by mistake he understated the number of children.

The bequest, to the three children of Henry Beyerle, when there are four children, would be ambiguous and uncertain, in the absence of anything on the face of the will or extrinsic circumstances to identify the three children named; and it would then become necessary, in order to arrive at the intent of the testator, to resort to the rules of construction, applicable to cases like the one in hand. Counsel for Mrs. Geiss takes the position that there is nothing in the will, and no evidence here to show, what testator meant by using the word "three" instead of four or all the children; and that consequently the case falls under the well recognized rule of interpretation, viz: Where a person refers to a class of persons, as the objects of his bounty, but, in an attempted enumeration, omits to name one or more of them or in describing them specifies a number which is less than the actual number, the parties omitted may still take and will be included, unless there be something to show the omission was of purpose: *Vernor vs. Henry*, 6 Watts Rep. 192; *Henner-shotz's Estate*, 16 Pa. St. 435; *Urie's Executors vs. Irvine*, 21 Pa. St. 310; *Luce et al., vs. Harris*, 79 Pa. St. 432. This principle would control this case, if neither the language in the will nor the surrounding circumstances indicated clearly which of the three children the testator had in mind when he made his will and directed the legacy of \$1,000.00 and a part of the residue to be paid to them. But we think the rule cannot be invoked here, because a reading of the item, under which this question arises, together with the facts shown at the hearing, can hardly leave any doubt that the testator intended the three children of the second wife to be the objects of his bounty.

There is no difficulty about the facts of this case. Henry Beyerle, the nephew of the testator was married twice. He had one child, Carrie, with his first wife, from whom he was divorced. He had three children, Paul, Henry, Maude, with the second wife, who is the widow of Henry Beyerle mentioned by the testator in his will. Carrie Geiss is now married, and there is no evidence to show that after her mother was divorced from her father she lived with the latter, nor does it appear that there was any friendly relation between her and the testator, or that he ever concerned himself about her or manifested any interest in her. On the other hand, it was shown by testimony that the testator often visited the family of the second wife and the three children, that he saw them about once a week at their house after Henry Beyerle's death, and that he "done lots for them, he used to buy them clothes and shoes and things." Now this evidence clearly shows that he was personally interested in the three children living with their mother, and that when he spoke about the three children

in his will he undoubtedly meant these three children, whom he personally knew and to whom he was attached.

Again, looking at the language of the whole item of the will in which this bequest appears, it seems to me, it can hardly be doubted that testator was only thinking of the three children of the second wife, as the prospective recipients of his bounty. He directs the interest to be paid to the widow of Henry Beyerle, "for and during and until their youngest child shall have reached the age of twenty-one (21) years, when the principal shall be paid to the three children of said Henry Beyerle, share and share alike;" and in case at the death of testator's widow, all of "said children" have arrived at legal age, then the principal sum shall be equally divided to and among "the said three children" of Henry Beyerle, deceased.

The whole tenor of this provision and the language used, show a purpose to give the legacy to the widow and her three children. He speaks about "their children," "the three children," "all of said children," "the said three children,"—words which clearly indicate that he meant their three children. If the testator had used the pronoun "their" instead of the article "the" in speaking of "the three children," there would be no question at all as to the identity of the children. But the reason for using the words "their" and "the three" is that they refer to the same individuals, testator knowing that Henry Beyerle had only three children with the second wife. If testator had intended to give this legacy to all the children of Henry Beyerle, deceased, he would not have described them as three, when he knew there were three children with one wife and one child with another. But the very fact that after he speaks about "their" children, he follows it by "the three children" which are all the children they had, demonstrates that these two expressions have reference to the same persons. The testator did not use the number "three" under the apprehension that it included all the children of Henry Beyerle, deceased; but used it because it specified the number of children with the second wife, whom he knew and was anxious to remember.

The first object in the construction of a will is the carrying out the intention of the testator; and in the light of the language employed in the will and the parol evidence, we believe that we are following the testator's intention, by holding that he did not intend the whole class of children to take and was not mistaken in the number, but used the words "the three" to designate the children with the second wife, who were to be the objects of his bounty.

SPENCER'S ESTATE**Guardians—Appointment—Revocation.**

Where the Orphans' Court has appointed a maternal aunt as guardian of two orphan minors, on petition of a cousin of their mother's, the court will not subsequently remove the guardian because no notice of the application for the appointment had been given to the paternal aunt and grandfather of the children, such notice not being required under the rules of Court.

Guardians—Removal—Act 29 March, 1832, Sec. 12, P. L. 192.

The Orphans' Court has power to remove a guardian only on due proof of his mismanagement of the minor's estate or misconducting himself in respect to the maintenance, education or moral interests of the minor.

Guardians—Appointment—Religious Faith of Parents of Minors—Fiduciaries Act 7 June, 1917, Sec. 59, P. L. 529.

The Fiduciaries Act of 1917 re-enacts the provisions of Act March 29, 1832, and makes it the imperative duty of the Court to appoint a guardian of the person of a minor of the same religious faith as that of the parents, if it can be done without materially affecting their temporal welfare.

In the Orphans' Court of Berks County.

Citation for revocation of guardian appointment.

H. P. Keiser and Harry J. Dumn for petitioner.

George J. Gross, contra.

Opinion by Schaeffer, P. J., January 29, 1918.—This is an application for the removal of a guardian appointed by the Court.

Raymond E. Spencer, late of the Borough of Birdsboro, said county, aged — years, died January 28, 1917, intestate, leaving to survive him Annie Spencer, his widow, and two children, George Spencer, aged three years, and Jeannette Spencer, aged two years.

Annie Spencer, the widow, died April 28, 1917, leaving a will dated April 17, 1917 which was duly probated before the Register of Wills of said county, on May 2, 1917, and letters testamentary were granted to Mary E. McDonough, a sister of the decedent, the executrix named therein. In her last will and testament Annie Spencer appointed the Pennsylvania Trust Company, of Reading, guardian of the estate of the said minor children, and committed the care and custody of her children to Mary E. McDonough, her sister, until they became of age.

Mary E. McDonough, the executrix and testamentary guardian of the minor children aforesaid, died in July, 1917. On August 1, 1917, upon the petition of John McDonough, a cousin of Annie Spencer, deceased, this Court appointed Catharine C. Dougherty, wife of James Dougherty, and sister of Annie Spencer, guardian of said minor children, and who now has possession of them.

A petition for the removal of Catharine C. Dougherty was presented by Lillie Spencer, a sister of Raymond Spencer,

deceased, and an aunt of these minor children. The possession of these minors is the subject of controversy in this proceeding.

The petitioner avers that the appointment of Catharine Dougherty was made without any notice to her, or to Daniel Spencer, the grandfather of the minor children, who is the nearest of kin of the said minors; that she is forty-six years of age, keeping home for her father, Daniel Spencer, in the Borough of Birdsboro, and had helped to rear Raymond E. Spencer, the father of these minor children; that during the time Raymond E. Spencer lived in Birdsboro with his family, the said minor children frequently visited their family, and by reason thereof a very close attachment was formed between the petitioner, the grandfather and the minors; that the grandfather is a man of property and is willing that the said minors shall live with him and the petitioner; that Catharine Dougherty, the present guardian, has two children, and on account of her many household duties is unable to give the minors the care and attention which they would receive in the family of the petitioner, which consists of herself, her father, and a sister thirty years of age.

Catharine Dougherty, the guardian, filed an answer to this petition and the citation thereon issued, in which she sets forth that the petition does not contain legal grounds upon which the Court could base an order for revocation of its appointment of her as guardian of said minors; that the present guardian is a Roman Catholic, in which faith the said children were baptized with the full consent and co-operation of their father; that said petitioner is not of the Roman Catholic faith, and is averse to having said children brought up therein; that Mary E. McDonough, the testamentary guardian of said children under the will of their mother, Annie C. Spencer, made her own last will, dated July 27, 1917, in which she confided the said children to the present guardian for the purpose of having them brought up in the Roman Catholic faith.

Considerable testimony was taken in Court on both sides in support of the contentions made by them.

The Act of March 29, 1832, Sec. 12, which gives us the power of removal, provides that "the Orphans' Court shall have power to remove any guardian, whether testamentary or otherwise, on due proof of his mismanagement of the minor's estate, or misconducting himself in respect to the maintenance, education or moral interest of the minor."

Therefore, before the Court can remove a guardian, it must be shown by due proof that he has been guilty of mismanagement of the estate of the minor or of such misconduct as is pointed out in the aforesaid Act of Assembly—proof

amounting to more than light and unimportant accusations: Schaeffer's Estate, 1 Brewster, 528-529.

It must be conceded that it would have been very desirable and have given every one interested in these children an opportunity to be heard, if less haste had been used in securing this appointment and notice given to all the parties interested of the time when the application was made. However, since no notice is required under our rules of Court, we cannot say that the appointment of Mrs. Dougherty as guardian without notice having been given, is invalid, and, therefore, we must regard her as the legally appointed guardian of these children. As such she cannot be removed unless mismanagement of the estate or misconduct on her part is shown; and we do not feel that there is sufficient evidence to justify us in ordering a removal on either of these grounds. Indeed, it is admitted that the character of the present guardian is beyond reproach, and that she is an estimable lady in every respect. This is equally true of the petitioner, and her father and the rest of her family, who are all highly respected in the community in which they reside and about whose moral fitness to take care of these children there is not the least doubt.

The principal reason urged for a change in the guardianship seems to be that it would be of material advantage and for the moral welfare of the minors to be reared by the petitioner and her father and sister, at their home at Birdsboro. The petitioner contends that they are financially in a better position than the present guardian is to rear these children and to provide them with the comforts and training essential to their welfare. The testimony shows that the petitioner, who is forty-six years of age, is unmarried, is unfitted for hard work and has about four hundred dollars. She lives with her father, who is seventy-seven years old, who has five children living, and whose estate consists of a frame dwelling house worth about \$1,700. He receives a pension of \$30 monthly, and \$15 per month for board from one of the daughters. These facts will hardly warrant us in finding that the material prospects of the children would be very much brighter with the petitioner than they are with the present guardian. The father is seventy-seven years of age, and the probabilities are that after his death his estate will be divided between his children, and thus the income which the petitioner is enjoying at present would be reduced considerably.

While it is true that the present guardian has no estate of any kind and is wholly dependent for her support and that of the two children and the two minors on the earnings of her husband, and herself at times, yet we see no reason why this should be a cause for her removal. The testimony is all to the effect that she is a good hard working mother and takes good

care of all these children. Moreover, these minors have an estate of about \$7,000, the income of which can be used for their support and maintenance if it is found necessary at any time to do so. It is also claimed that the husband of the present guardian is intemperate, and that there has been some trouble in their family on account of his drinking habits. What the extent of his drinking is at present does not appear, nor has any testimony been offered to show that he is not supporting his family at present. Of course, it need hardly be said that drunkenness and its consequences in a home are not conducive to the proper moral atmosphere and influence in and under which to rear children.

While it is important for the Court to consider the temporal interests of these children, we are also obliged to look after their religious welfare, in appointing a guardian. The religious training of these children is undoubtedly what the families of the deceased parents are greatly concerned about, and is the underlying cause of the trouble existing between them at this time. This is very unfortunate for these children and all the parties; and it is to be regretted that the relatives on both sides could not find some way in which to adjust their differences and agree to an arrangement which would provide the proper spiritual nurture for these children and preserve and promote the mutual good will and affection of them and their relatives.

The Act of March 29, 1832, relating to Orphans' Courts, provided that persons of the same religious persuasion as the parents of the minors shall in all cases be preferred by the Court in their appointment as guardians of the persons of such minors. This Act has been re-enacted by Sec. 59 of the Fiduciaries Act of July, 1917, P. L. 529. The section makes it the imperative duty of the Court to appoint a guardian of the same religious faith as that of the parents of the minors, if it can be done without materially affecting their temporal welfare: *Park's Estate*, 7 District, 700. In *Nicholson's Appeal*, 20 Pa. St. 50-54, Chief Justice Black said: "The law which forbids the appointment of a guardian whose religious faith differs from that of the parents, should be most strictly obeyed, whenever it is practicable, for reasons, so many and so obvious that they need not be repeated."

In this case the father of the minors was a Protestant, but it does not appear whether he was a member or communicant of any church. The mother was a Roman Catholic. These children, with the sanction and approval of the father, who was present at the ceremony, were baptized into the Roman Catholic Church, and thereby are considered by that Church as members thereof: *Park's Estate*, *supra*, 701. The father before the marriage agreed that the issue of the mar-

riage should be baptized and brought up in the faith of the Catholic Church. That he regarded the promise made to his wife and before the priest concerning the religious training of their issue as sacred and inviolable is proved by his participation in the baptismal ceremonies for these children. The mother, who died after the father, in her will committed the care of her children to her sister, Mary McDonough, who was a Catholic. Mary McDonough died and she likewise expressed the desire in writing that these children should be reared in the Catholic faith and should be taken care of by the respondent, Catharine Dougherty.

Mrs. Dougherty, the maternal aunt of these children, who has two children of her own, naturally has a feeling akin to a mother's love for the two orphans of her deceased sister, and is willing and anxious to keep them in her own home and give them all the comforts and care which her home can furnish and provide.

It is very evident, from the facts in this case, that it was the expressed intention of both parents of these minors that they should be brought up in the Catholic faith, the mother emphasizing this desire by appointing a testamentary guardian for the children who was of that faith. We feel that we should not ignore one of the last thoughts and wishes of the mother, concerning the care, religion and training of her children; and that under the Acts of Assembly compelling us to properly regard the faith of the parents in appointing a guardian and authorizing us to remove a guardian only for mismanagement and misconduct, we cannot, in view of the facts in this case, remove the guardian.

The rule is discharged and the petition is dismissed.

MANWILLER vs. MANWILLER, Adm'x

Practice, C. P.—Province of Court and Jury—Reformation of Written Instrument—Assignment.

Where, in an issue to determine whether a written assignment of an insurance policy purporting to be as collateral security, should, by reason of mutual mistake of the parties at its execution, be reformed to an absolute assignment, and the reformation depends upon oral testimony, the question is for the jury, no matter how indisputable may be the proof.

In the Court of Common Pleas of Berks County.

No. 60 August Term, 1916.

Rules for new trial and for judgment n. o. v.

E. H. Deysher for defendant and rules.

Snyder, Zieber and Snyder for plaintiff.

Opinion by Wagner, J., February 5, 1918.—This is an issue to determine whether the plaintiff, Daniel H. Manwiller, or the defendant, Frances E. Manwiller, administratrix of Henry H. Manwiller, deceased, is entitled to the sum of \$1,704.14, balance due on a policy of insurance held by the decedent in the Northwestern Mutual Life Insurance Company, and which sum by the company has been paid into court awaiting the determination of this issue.

On December 15, 1914, Henry H. Manwiller, after proceedings in bankruptcy had been instituted against him, and in the settlement of said proceedings, assigned the policy in question to the plaintiff, the consideration therefor being its then full value. The assignment shows this on the face:

“Assignment of Policy as Collateral Security for Present and Future Indebtedness.”

In the body of the assignment, we have:

“The interest of the assignee in the policy hereby assigned shall include any and all indebtedness which I may now or at any time hereafter be owing to the said assignee and which may exist at the time of the settlement of the policy, the remainder of said policy, if any, being unaffected by this assignment.”

It is clear that this assignment is as it purports to be, an assignment as collateral security for present and future indebtedness. The plaintiff contends that a mutual mistake was made in its execution in that what was intended was an absolute and not a collateral assignment. The determination of aforesaid issue depends upon whether or not the collateral assignment be reformed into an absolute assignment. To thus reform it plaintiff offered in evidence the testimony of John B. Stevens, attorney for Henry H. Manwiller at the time of the assignment; H. Robert Mays, Trustee in Bankruptcy of Henry H. Manwiller, and Joseph R. Dickinson, attorney for the Trustee. These three persons were present at the time the assignment was made by Henry H. Manwiller, and testified that a mistake as claimed for by plaintiff had been made.

The duty of the trial judge in a case of this kind is stated in *Highlands vs. Railroad Co.*, 209 Pa. 286, at pp. 291, 292: “Under our peculiar system of administering equitable principles in common-law actions, the judge presiding at the trial performs the functions of a chancellor, and if his conscience is not moved to grant the equitable relief sought, it is his duty to interpose, either by withdrawing the case from the jury, or by refusing to receive or enter judgment on a verdict that is contrary to equity and good conscience. As a judge, he ought not to permit a jury to do what he, as a chancellor, would not sanction.” The evidence of plaintiff’s three witnesses was

such that if this had been a suit in equity to reform the assignment it would have warranted the court in granting the equitable relief sought.

Plaintiff's counsel upon this evidence asked the court for binding instructions, contending that the court as a chancellor should not permit the jury to find otherwise than what he as a chancellor would sanction. That is, that this case upon this evidence impelled the reformation of the instrument. We affirmed this point and directed the jury to find in favor of the plaintiff. This is assigned as one of the reasons for a new trial. If the evidence in a case of this kind is such that a verdict by the jury reforming the instrument would not be contrary to equity and good conscience, then the course to be pursued by the trial judge is thus pointed out in *Highlands vs. Railroad Co.*, supra. p. 292: "On the other hand, where the character and measure of proof are sufficient to satisfy the conscience of the trial judge, were he sitting as a chancellor, that the party is entitled to the equitable relief he seeks, the case should be submitted with proper instructions to the jury, and a verdict in accordance with the proof should be sustained."

The reformation of the assignment depended entirely upon parole evidence. The reason why the issue upon this parole evidence should have been submitted to the jury, is stated in *Duffy vs. York Haven W. & P. Co.*, 233 Pa. 107, p. 110: "However indisputable may be the proof, when it depends upon oral testimony it is nevertheless the province of the jury to decide: *Reel vs. Elder*, 62 pa. 308." See also *Lindemann vs. Pittsburgh Railways Co.*, 251 Pa. 489, 493; *Second National Bank of Pittsburgh vs. Hoffman*, 229 Pa. 429, 433. The case was clearly one for the jury.

Rule for new trial made absolute; rule for judgment n. o. v. discharged.

EGE vs. ARNOLD.

Practice, C. P.—Appeals From Aldermen's Judgments—Plea—Practice Act of 1915, P. L. 483.

The Practice Act of 1915 applies to appeals from aldermen's judgments and a rule on defendant to plead will be discharged. When the appeal is entered in the Common Pleas the case begins de novo and is thenceforth to be conducted under the Practice Act.

In the Court of Common Pleas of Berks County.

No. 108 April Term, 1916.

Rule to plead.

Harry J. Dumn for plaintiff and rule.

J. Milton Miller for defendant.

Opinion by Wagner, J., February 5, 1918.—Plaintiff brought suit against the defendant before an Alderman and recovered a judgment in his favor. Defendant appealed the case to court, whereupon plaintiff took a rule on defendant to plead. To this rule defendant filed an answer contending that under the Practice Act of 1915, P. L. 483, the proper practice is that plaintiff file a statement, to which defendant then files an affidavit of defense, and that this constitutes the pleadings. The question therefore is whether cases of appeal fall under the aforesaid Practice Act.

In *Lincoln vs. Reading Elec. Co.*, 9 Berks Co. Law Journal, 133, this court decided that they do fall under this Act. Rule to plead is discharged.

BYLER vs. GREAT ATLANTIC & PACIFIC TEA CO.

Negligence—Evidence—Nonsuit.

Plaintiff sued to recover damages for the loss of a horse hired from him by defendant and claimed to have been injured through defendant's negligence. Plaintiff's evidence showed that defendant's driver took the horse to the stable of a hotel in Bernville where he unhitched it and allowed it to graze along the roadside; that the horse wandered into the stable; that the hostler upon inquiry from the driver, said "that is all right, I just put hay in the stall;" that the horse in walking about the stable stepped upon a plank pump bed covering a well, the boards of which were in a rotten condition and gave way, throwing him into the well, whereby he sustained injuries which necessitated his being killed. There was no evidence that the driver knew of the rotten condition of the pump bed, which was not such as to be plainly apparent. **Held:** that a non-suit was properly entered, since the evidence showed that the cause of the accident was the rotten condition of the pump bed, for which defendant was not responsible.

In the Court of Common Pleas of Berks County.

No. 47 August Term, 1917.

Rule to take off non-suit.

Harry J. Dumn for plaintiff and rule.

John B. Stevens for defendant.

Opinion by Wagner, J., February 5, 1918.—This is a suit by the plaintiff against the defendant wherein he claims damages for the loss of a horse which defendant had hired from him and which plaintiff contends was injured through the negligence and carelessness of the defendant.

Plaintiff's evidence of negligence was that Drumheller, the employee of the defendant, upon arriving at Bernville, took the horse to the stable of the Eagle Hotel. He and the hostler, Wilson Berger, then unhitched the horse, and whilst they were greasing the wagon Drumheller allowed the horse

to graze along the roadside. After the horse had grazed there for sometime, he, of his own accord, walked into that part of the stable where the horses' stalls were. The hostler, upon inquiry from Drumheller, said: "That is all right, I just put some hay in the stall." (N. of T. p. 5). Along the side of this part of the stable there was a well with a pump and a pump bed. The horse, after going into the stable, walked over to the place where the well was, trod on the planks of the pump bed, which, on account of their rotten condition, gave way, and the horse fell into the well, and was injured to such an extent that he had to be killed. There is no evidence to show that Drumheller knew anything of the rotten condition of the pump bed. The hostler testified that this condition could not very well be seen and that one who was not familiar with the place would not know whether it was rotten or not. Under the facts as thus testified to we held that the plaintiff had not shown any negligence in Drumheller, the employee of the defendant, and granted a non-suit.

The mere fact of allowing the horse to graze along the road was not negligence. He was not injured whilst doing this. Allowing a horse to enter the stable of a hotel, which the defendant's employee had a right to presume, and in addition was assured by the hostler to be all right, does not constitute negligence. The cause of the accident was the rotten condition of the pump bed, for which defendant was not responsible.

Rule to show cause why non-suit should not be taken off is discharged.

**ALLENTOWN PORTLAND CEMENT CO. vs. HUY
et al. (No. 2.)**

In the Court of Common Pleas of Berks County: In Equity.

No. 1117 Equity Docket, 1913.

Exceptions to findings of fact and conclusions of law.

John B. Stevens for defendant and exceptions.

Cyrus G. Derr for plaintiff.

Opinion by Wagner, J., February 5, 1918.—Defendants have filed exceptions to the seventh finding of fact and the three findings of law. A re-examination of the evidence bearing upon the finding of fact excepted to does not convince us of any error therein.

The defendants contend that their right is based upon the grant under the will of John Reeser, as shown on N. of T., pp. 54-56, and not upon a prescriptive right. A prescriptive right is based upon the presumption of a grant. The will of John Reeser does not show any other right in the defendants to the water than that for mill purposes. It is consequently immaterial whether we call this a right by grant to the water for mill purposes, or a prescriptive right which presumes this grant. The fact, therefore, that the right was treated as a prescriptive right instead of a right by grant, was immaterial in the determination of the question involved in this case and do not affect the findings of law.

And now, February 5, 1918, the exceptions are dismissed and counsel for plaintiff may prepare and submit the proper final decree sec. reg.

COMMONWEALTH vs. POTTEIGER

Criminal Law—Costs—Duplication—Act 10 March, 1905, P. L. 35.

P., treasurer of a lodge, was convicted on two indictments for embezzlement of moneys received by him from members in payment of dues. Each indictment contained three counts, each count specifying one act of embezzlement. The evidence showed that the lodge met once a month at which time the treasurer should have reported all collections for the preceding month; and that of the six sums embezzled, two had been received in January, two in March and two in June, the whole within the space of six calendar months.

On exceptions to taxation of costs, **Held:** that the time of embezzlement was the time when defendant should have reported the receipt of these sums at the regular meetings of the lodge, and there being but three acts of embezzlement within the space of six months, but one bill of indictment was necessary; and that under Act 10 March, 1905, P. L. 35, costs should be allowed in but one case.

In the Court of Quarter Sessions of Berks County.

Nos. 78 and 79 June Sessions, 1917.

Exceptions to taxation of costs.

Thomas K. Leidy for defendant and exceptions.

Harvey F. Heinly and Wilson S. Rothermel, District Attorney, contra.

Opinion by Wagner, J., February 5, 1918.—The matter under consideration consists of exceptions to the taxation of costs in two cases, Nos. 78 and 79 June Sessions, 1917, Commonwealth vs. Albert S. Potteiger, the defendant contending that under the Act of March 10, 1905, P. L. 35, costs should be allowed in but one case.

The indictments are based upon two informations. The one charges that the defendant between January and July 2,

1916, did fraudulently embezzle and feloniously steal \$7.80, \$1.95, \$1.95, as an employee of Sirius Castle, No. 63, Knights of the Golden Eagle. The other information is similar, except that the first of the three amounts alleged to have been embezzled is \$5.00 instead of \$7.80. Each of the two indictments contains three counts. The one indictment charges that \$7.80 was embezzled on January 17, 1916; \$1.95 on March 20, 1916, and \$1.95 on June 19, 1916. The other bill charges embezzlement of \$5.00 on January 17, 1916; \$1.95 on March 27, 1916, and \$1.95 on June 17, 1916.

It is plain that this indictment is drawn under Sec. 28, Act 1860, P. L. 427, 437, and that the offense charged falls under Sec. 107, Act 1860, P. L. 382, 409. The purpose of the Act of 1905 is thus set forth in *Com. vs. Smith*, 62 Pa. Superior Ct. 288, on page 290: "The Act of March 10, 1905, P. L. 35, provides that it shall be unlawful for any person instituting or prosecuting a criminal suit to duplicate any return, complaint, information, indictment, warrant, subpoena or other writ, where the offenses charged grew out of the same transaction, and the second section makes it unlawful to tax costs in more than one case where the offenses might have been included in one complaint or indictment. If we look at the act, it is very evident that its purpose was to prevent a duplication of costs. The title to the act is 'An act relating to the institution, prosecution and taxation of costs in criminal cases.' The preamble refers to certain practices which have arisen in criminal cases whereby unjust burdens have been placed upon the taxpayers of this Commonwealth. But the act does not, in case of a duplication of cases, affect the validity of the proceedings." The question then is not whether the proceedings in these two cases were illegal, but whether one complaint and one indictment would have been sufficient to include the charges contained in these two cases, and thus have prevented the duplication of costs. If this could have been done, then, under the Act of 1905, costs in but one case can be allowed.

It is evident that these six sums of money alleged to have been embezzled are dues collected from the members by the defendant, the treasurer of the lodge. Embezzlement consists not in the collection of these items, but in the failure to turn them over. As is said in *Com. vs. Keuhne*, 42 Pa. Superior Ct. 361, on page 371: "The wrongful act is the fraudulent embezzlement, the intentional misappropriation of his employer's money." It is an admitted fact that the lodge, whose funds were alleged to have been embezzled, met but once a month. If, as is contended by the Commonwealth, the time of embezzlement is the time when defendant should have reported the receipt of these various sums at the regular stated meeting of the lodge, then there are but three acts of embez-

zlement, and these acts occurred within the space of six calendar months. Therefore under Sec. 28 of the aforesaid Act of 1860 but one bill of indictment was necessary. In the one indictment you have the appropriation of \$7.80 on January 17; in the other on the same date the appropriation of \$5.00. There two clearly could have been placed in one count. The same with the items of March 20 and March 27, and with those of June 19 and June 17.

The exceptions are sustained and we direct that costs be paid in but one of these cases.

DEELMAN vs. SHERMAN et al.

Real Estate—Building Restrictions—Construction.

Where, in a suit in equity to restrain the building of a porch or terrace adjacent to a dwelling, alleged to be in violation of a building restriction, and the determination of the rights of the parties depends on the interpretation to be given to the word "building" in the restricting agreement, of which there was insufficient evidence at the trial, the case will be referred back for further testimony.

In the Court of Common Pleas of Berks County: In Equity.

No. 1186 Equity Docket, 1917.

Bill for mandatory order.

Samuel E. Bertolet and Frank S. Livingood for plaintiff.

Cyrus G. Derr for defendants.

Opinion by Wagner, J., February 13, 1918.—The plaintiff has prayed the court for a mandatory order directed against the defendants to remove a certain structure agreed by the expert witnesses of both parties to be a terrace. Plaintiff claims that the erection thereof is in violation of a building restriction established by a written agreement of June 19, 1914, between the plaintiff and Spencer L. McIlvain, the predecessor in title of the defendants. The agreement provides that defendants' property be "subject to the condition and restriction that any building thereon erected must be built not less than 20 feet south of the southern building line of said Greenwich street."

In Paragraph 5 of plaintiff's bill, it is averred that the purpose of this agreement was that "the parties desired that building restrictions appertaining to all the real estate fronting on the south side of Greenwich Street should be the same." The determination of this question whether the structure com-

plained against is prohibited by this agreement, depends upon the construction to be given to the word "building" in the agreement in the light of the aforesaid intent.

There is not a particle of evidence offered by either plaintiff or defendants to show what the building restrictions appertaining to all the real estate fronting on the south side of Greenwich Street were at the time this agreement was entered into, to enable the court to interpret it so that defendants' property conform with the other real estate on Greenwich Street.

In 13 Cyc 714, we have this principle: "In construing covenants or restrictions as to the use of property the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. So the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation." In *Murphy vs. Ahlberg, et al.*, Ex'rs, 252 Pa. 267, on page 269, this rule is stated: "The general rule is that the language of a deed should be interpreted in the light of the apparent object or purpose of the parties and of the conditions existing when made: *Meigs vs. Lewis*, 164 Pa. 597." In *Law vs. Weeter*, 68 Pa. Superior Ct., 23, it is said (p. 27): "The proper construction to be placed on such a building restriction, very frequently depends not only upon the phraseology of the particular restriction, but it is to be considered in connection with the nature, character, size, purpose, etc., of the project in question, with a common sense interpretation to be placed upon the words used under the particular facts of the case." This case largely depends upon the interpretation to be given to the word "building" as that word has been used in connection with the other properties on Greenwich Street. So that we may give to the agreement of June 19, 1914, a fair and just interpretation, we will make this order:

And now, it wit, February 13, 1918, we direct that this case be referred back for evidence bearing upon the question of what the building restrictions to the other real estate fronting on the south side of Greenwich Street are.

ROTHERMEL et al. vs. SUPERVISORS OF MUHLBERG TWP. et al.

Township Supervisors—Contracts for Lighting Streets of Village—Petition by Owners of Less Than Majority of Frontage—Tax Levy—Injunction—Act 28 May, 1913, P. L. 371.

The Act of May 28, 1913, P. L. 371, authorizes township supervisors of townships of the second class, upon petition of the owners of a majority of the lineal feet frontage along any highway or por-

tion thereof in any village within the township, to enter into contract with a lighting company to illuminate the streets and highways. Where such petition asks for the illumination of the highways of a village, it is to be considered as a petition to illuminate all the highways of the village, and if it is not signed by the owners of a majority of the lineal feet frontage along all the highways, the supervisors have no authority to contract, and a contract entered into by them with a lighting company will be declared void, and a tax levy to pay the cost of the lighting will be restrained.

Public Service Commission—Approval of Contract—Jurisdiction of Court.

The fact that a certificate of approval of the contract had been granted by the Public Service Commission does not take away the jurisdiction of the Court nor prevent its inquiring into the validity of the contract. The powers of the Public Service Commission are administrative, not judicial.

In the Court of Common Pleas of Berks County: In Equity.

No. 1180 Equity Docket, 1916.

Bill for injunction.

Cyrus G. Derr for plaintiffs.

Wilson S. Rothermel for Supervisors.

John A. Keppelman for Metropolitan Electric Co. et al.

Opinion by Wagner, J., February 23, 1918.

FINDINGS OF FACT.

1. The plaintiffs are citizens and taxpayers of Muhlenberg Township, Berks County, Pa., owning taxable real estate situate therein. They constitute a committee representing about 300 other citizens and taxpayers of said township.

2. The plaintiffs own property in the territory composed of the villages of Hyde Park, Hyde Crest, and Hyde Villa, in the township of Muhlenberg.

3. (a) Francis Rothenberger, Franklin G. Weidenhammer and Harrison A. Rothermel are the supervisors of Muhlenberg Township.

(b) The Metropolitan Electric Company is a corporation under the laws of Pennsylvania, producing and furnishing electricity for various purposes, including light.

(c) Muhlenberg Township is a township of the second class under the laws of Pennsylvania.

4. On January 8, 1916, an agreement was entered into between Francis Rothenberger, Franklin G. Weidenhammer and Harrison A. Rothermel, aforesaid supervisors, and the Metropolitan Electric Company.

5. In this agreement is recited that in conformity with the provisions of the Act of Assembly of May 28, 1913, P. L.

371, a petition of the owners of a majority of the lineal feet frontage along the highways, or portions thereof, in the villages of Hyde Park, Hyde Crest and Hyde Villa, situated in the Township of Muhlenberg, township of the second class, was presented by the signers thereof to the said supervisors at a regular meeting of the supervisors held on December 6, 1915. That in the petition the petitioners requested the said supervisors to enter into a contract to light and illuminate the streets and highways and other public places in said villages of Hyde Park, Hyde Crest and Hyde Villa with electric light. That the supervisors pursuant to their unanimous action taken at their aforesaid meeting held on December 6, 1915, requested the Metropolitan Electric Company to "submit a bid for the lighting and illumination of the streets, highways and other public places in the said villages of Hyde Park, Hyde Crest and Hyde Villa with electric light for a term of five (5) years from February 1, 1916, to the end that a contract for such lighting and illumination for said term be entered into between the parties hereto in accordance with the aforesaid Act of Assembly of May 28, 1913, P. L. 371." In the agreement the Metropolitan Electric Company agrees with the supervisors, as follows:

(1) To furnish all the materials and to do and perform all the work and labor for the erection of poles, the stringing of wires, and the installation of not less than thirty-five (35) incandescent tungsten lamps of a rated seventy-five (75) candle-power each upon the streets, highways and public places in the aforesaid villages of Hyde Park, Hyde Crest and Hyde Villa, the locations of said poles, wires and lamps to be approximately as shown on the blueprint marked Exhibit "A" hereto attached and made a part hereof; and to maintain the same in serviceable condition during the term of this contract.

(2) To install such additional lamps of a rated seventy-five (75) candle-power each as shall be required to illuminate the streets, highways and other public places in said villages with electric light, such additional lamps to be located at such places as the said parties of the first part shall designate; and to maintain the same in serviceable condition during the term of this contract.

(3) To furnish and supply electric current for said thirty-five (35) lamps and such additional lamps for the lighting and illumination of the streets, highways and public places in the said villages of Hyde Park, Hyde Crest and Hyde Villa from sunset to sunrise during each and every day for the period of five (5) years from February 1, 1916.

6. The petitions referred to in the agreement contain, inter alia, this: The petitioners are citizens and taxpayers and owners of real estate in the villages of Hyde Park, Hyde Crest

and Hyde Villa. That they are the owners of a majority of the lineal feet frontage along all the highways, or portions thereof, in the villages of Hyde Park, Hyde Crest and Hyde Villa. That they are anxious to have electric light introduced to illuminate said highways.

7. These petitions are the petitions upon which is founded the aforesaid contract of the supervisors of Muhlenberg Township with the Metropolitan Electric Company, dated January 8, 1916, and are not signed by the owners of a majority of the lineal feet frontage along the highways of the villages embraced in said contract.

8. The said supervisors subsequent to the date of the contract of January 8, 1916, levied a tax of three mills upon all the property abutting on the streets upon which the lights were placed for the purpose of paying the cost of said lighting.

DISCUSSION.

The Act of May 28, 1913, P. L. 371, provides:

"That the township supervisors of any township of the second class in this Commonwealth are * * authorized and empowered, on the petition of the owners of a majority of the lineal feet frontage along any highway, or portion thereof, in any village within said township, to enter into contract with electric, gas or other lighting companies, to light and illuminate the streets, highways and other public places in said villages with electric light, gas light or other illuminate."

This act makes the legality of the contract to be entered into between the supervisors of a township of the second class and a lighting company, dependent upon a petition of the owners of a majority of the lineal feet frontage along the highways, or portions thereof, which are to be lighted under the contract.

In the case under consideration the petitioners stated that they were the owners of a majority of the lineal feet frontage along all the highways or portions thereof in the villages of Hyde Park, Hyde Crest and Hyde Villa, and that they were anxious to have electric light introduced to illuminate said highways. The petitions, therefore, are not for the lighting of a limited part of the highways or portions thereof in said villages, but for all of the highways or portions thereof. This petition, therefore, had to be that of the owners of a majority of the lineal feet frontage along all the highways of said three villages, before the supervisors had the power to enter into a contract. The contract which was signed on January 8, 1916, recites these petitions, and provides for the installation of lights not merely for some of the streets, but for all of the streets of these three villages.

We have found as a fact that the petitions upon which this contract was based were not the petitions of the owners of a majority of the lineal feet fronting along all the highways of said three villages. This fact was admitted at the time of the hearing, when Mr. Keppelman, of counsel for defendants, stated (N. of T., p. 255): "We do not come into Court alleging that we have a majority of all the streets." This fact was also again admitted by said counsel at the argument of the case. His contention, however, is that this Court is without jurisdiction to entertain this bill so far as it relates to the validity of the contract of January 8, 1916, for the reason that under the Public Service Act of July 26, 1913, P. L. 1374, a certificate of approval by the Public Service Commission having been issued, the question of the validity of the contract can be inquired into only by that Commission.

The powers of the Public Service Commission are administrative: Art. 5, Sec. 1, Act July 26, 1913, P. L. 1374. One of the questions raised by the bill is whether or not the contract is illegal by reason of the petition not meeting the requirements of the Act of May 28, 1913, P. L. 371, in that it is not the petition of the owners of a majority of the lineal feet along the highways requested to be lighted. This is a judicial and not an administrative question. As such the said act does not take away from the Court, even after the issuance of a certificate of approval by the Commission, the right to pass upon the legality of the contract. This position that it is a judicial question and for the determination of the Court, is taken by the Public Service Commission. In *City of Pittston's Petition*, 2 P. C. R. 105, it held: "Whether the contract was awarded to the lowest responsible bidder, within the meaning of legislation relating to advertisement and competitive bidding upon municipal contracts, is purely a legal question for the courts rather than for the Commission." Also in *Application of the Rayston Water Power Co.*, 2 P. C. R. 483, it held: "Whether or not the bid advertised contained a specification not strictly in accord with the letter of the law in asking bidders to submit rates for domestic consumption is a juridical question and not an administrative one, and is beyond the jurisdiction of the Commission. See also *Borough of Avoca's Petition*, 2 P. C. R. 372, 376; *Venner vs. New York Cent. & H. R. R. Co.*, 164 N. Y. Supp. 626, 657.

FINDINGS OF LAW.

1. This Court has jurisdiction to entertain the bill to determine under the Act of May 28, 1913, P. L. 371, the legality of the contract of January 8, 1916.

2. The contract of January 8, 1916, undertaken to be made by the aforesaid supervisors with the Metropolitan Electric Company is illegal and void.

3. The tax levy entertained to be made in pursuance of said contract and to cover the expenses thereof, is illegal and void.

4. The plaintiffs are entitled to an injunction to perpetually restrain Francis Rothenberger, Franklin G. Weidenhammer and Harrison A. Rothermel, supervisors of the Township of Muhlenberg, The Metropolitan Electric Company and Muhlenberg Township, defendants, from doing anything in pursuance of the contract of January 8, 1916, and of the tax levy as found in the Eighth Finding of Fact, other than in treating said contract and tax levy as void and not binding.

5. The costs of the proceeding shall be paid by the defendants.

And now, February 23, 1918, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

COMMONWEALTH vs. HEISLER (No. 2)

Practice, Q. S.—Reargument—New Evidence.

A reargument of a rule for new trial will not be granted to a defendant, convicted of felonious breaking in, where the new evidence, as shown by depositions, consists of statements which on their face appear improbable and are contradictory to evidence given by the defendant himself at the trial.

In the Court of Quarter Sessions of Berks County.

No. 206 September Sessions, 1917.

Rule for reargument.

William B. Bechtel for defendant and rule.

Wilson S. Rothermel, District Attorney, contra.

Opinion by Wagner, J., February 23, 1918.—This is a rule for a reargument of this case. In an opinion filed on November 9, 1917, the rule for a new trial was discharged.

Defendant relies principally upon the depositions of Harry Stoudt. His evidence is that on the afternoon of the night when the alleged felonious breaking in occurred, he met the defendant and another person whose name is to him unknown. That he (Stoudt) was a jitney driver, and on that

afternoon took the defendant and the stranger out Centre Avenue to Riverside, from Riverside to the Six-Mile House, then to West Reading, and then to the City of Reading. That he proceeded to his garage on Reed Street with his car, washed it, and while there this defendant and the stranger remained at the hotel at Seventh and Walnut Streets, as the train on the P. & R., upon which they were to leave Reading was not then due. That about 4:30 or 5:00 in the afternoon he took these persons to meet the train at the P. & R. Station. The fact is that no P. & R. passenger train leaves Reading at this time or until about six o'clock. The improbability of this part of the story is apparent. They would hardly have a jitney driver take them to the station an hour or more before the train that they could take would arrive there, especially when the station is but a few squares from the hotel where they were stopping.

He further testified that he had an engagement to meet them again that night at the station at 12:30 or 1:00 o'clock, upon their return. Defendant's contention is that Stoudt was to meet him there for the purpose of going in Stoudt's car to Rote's restaurant for a chicken dinner. The only passenger train that arrives in Reading on the P. & R. at that time stops at the Franklin Street Station, which is but one square from Rote's restaurant. The Court can hardly be asked to believe this. In addition, Stoudt's whole story is entirely contradictory to that given by the defendant at the time of the trial (see opinion of November 19, 1917, p. 2).

Rule discharged.

REESER vs. RAHN

Practice, C. P.—Seduction—Evidence Requiring Cautionary Instructions to Jury—New Trial.

Plaintiff sued defendant for damages for the seduction of his wife, and recovered a verdict of \$1,500. The only evidence of the seduction was given by the wife, though both she and plaintiff testified that defendant had "admitted" and "confessed" his guilt, though they were unable to recall any language used by defendant fairly amounting to an admission. It appeared that the wife testified under the stress of what may have been a threat of abandonment, and though she said that the unlawful practices had continued for three years at weekly intervals, no witness was brought forward who observed anything suspicious between them. A prosecution for adultery had resulted in defendant's acquittal. On rule for new trial, **Held:** that in order to give to the verdict the conclusive effect ordinarily to be attributed to the verdict of a jury, the latter should have been cautioned about accepting the evidence without close scrutiny. Such cautionary instructions not having been given, a new trial was granted.

In the Court of Common Pleas of Berks County.

No. 26 August Term, 1917.

Rule for new trial.

John B. Stevens for defendant and rule.

William B. Bechtel and Lee Friday for plaintiff.

Opinion by Endlich, P. J., February 23, 1918.—In this action the plaintiff alleges, and seeks to recover damages for, seduction of his wife by the defendant, a man worth about \$6,500. The verdict was for the plaintiff for \$1,500, and the defendant is asking for a new trial. A careful review of the record has led to the conclusion that, in the absence of certain instructions to the jury, the evidence can hardly be regarded as adequate to sustain the verdict. The case is a peculiar one. The plaintiff's story rests entirely in testimony of the wife, uncorroborated by any other deposition or by any pertinent circumstances. It is true that both the wife and plaintiff say that when charged with the offence alleged here the defendant "admitted," "confessed," his guilt; that neither the wife nor the plaintiff recall any language used by the defendant fairly amounting to an admission or confession. Besides this, it appears that the wife testified under the stress of what may have been a threat of abandonment of her by the plaintiff if she did not support his claim on the witness stand. In brief the substance of her testimony is, that several years ago the defendant, whose wife is a first cousin to plaintiff's wife, began unlawful practices with the latter, continuing them with virtual regularity every Saturday evening between the hours of 8 and 9, sometimes a little earlier and sometimes a little later; that this was kept up for a period of three years; that she had arranged for and gave him signals indicating the plaintiff's absence from his home; that her children were always in the house when defendant came there; that she and the defendant were never interrupted and never went anywhere or were seen together. The parties lived near each other in one of the boroughs of this county. Yet no one was brought forward who observed anything suspicious between them or in the actions of either. A prosecution brought against the defendant for adultery resulted in his acquittal; and there have been various attempts on plaintiff's part to exact a settlement from the defendant, which failed. The defendant on his part denies the charge made against him absolutely and unqualifiedly. If the wife's story is true, it cannot be said that the verdict is plainly excessive. But it seems very manifest that the determination of its truthfulness involves a consideration of the evidence from a point of view to

which the jury's attention ought to have been directed in the charge. It is easy for a husband and wife, testifying in support of each other, to set up an accusation of this kind against a defendant, and it is correspondingly difficult for him to disprove it. To give to a verdict in favor of the plaintiff in a case like this the conclusive effect ordinarily to be attributed to the verdict of a jury, the latter ought to be cautioned about accepting the evidence without close scrutiny. It is not contended that a verdict could not be founded upon the testimony of the wife alone if sufficiently precise and convincing. But unless considered by the jury in the light of what has been indicated, under proper instructions from the Court, it does not seem possible to treat the evidence as adequately sustaining a verdict for the plaintiff. With such effect the evidence can be invested only by the jury's acceptance of it after fair cautions and instructions and a conscientious weighing of it in the light of such. These cautionary instructions were unfortunately omitted from the charge of the Court in this case. To be sure, there was no request which was understood specifically to ask for them, and there was no exception to the charge by the defendant. But after all the object of every trial is to elicit the truth: *Husvar vs. R. R. Co.*, 232 Pa. 278, 281, and that of every judicial proceeding, to administer justice: *R. R. Co. vs. Berry*, 68 id. 272, 279; *Lingenfelter vs. C. & I. Co.*, 84 id. 328, 332; *Henry vs. Huff*, 143 id. 548, 563; *Waln vs. Beaver*, 161 id. 605, 610. For that purpose, as has been pointed out in a number of cases, it has been the practice of this Court to be more liberal in granting retrials where the applicant's rights are not protected by exceptions, etc., than where they are. We are of the opinion that a new trial cannot justly be refused in this case, and therefore—

The rule to show cause is made absolute.

GRIESEMER vs. HENRY

Damages—Exemplary Damages—Charge of Court—New Trial.

In order to lay ground for the recovery of punitive damages in a personal injury case, it is not necessary that the declaration expressly claim such; it is enough if the pleadings and evidence entitle the plaintiff to ask them. In such case there is no error in the admission of the examination of the defendant as to his financial ability, or in negativing his point forbidding the jury to allow punitive damages; but in submitting the matter to the jury it is essential that the jury be informed by the Court as to the conditions which circumscribe the allowance of any but compensatory damages. Where this requisite is not met, a new trial should be granted.

In the Court of Common Pleas of Berks County.

No. 58 November Term, 1916.

Rule for new trial.

Leonard G. Yoder for defendant and rule.

Rothermel & Mauger for plaintiff.

Opinion by Endlich, P. J., February 23, 1918.—It is to be regretted that, because of a material omission in the Court's charge to the jury, the verdict rendered in this case will have to be set aside. The action is for personal and property injuries resulting from a collision with the defendant's automobile under circumstances which induced the plaintiffs to ask for punitive damages. The charge failed to explain to the jury the prerequisites for the allowance of such damages, and although perhaps the size of the verdict may not clearly appear to go beyond the possible limits of compensation in view of the injuries proven, it cannot of course be said, except upon the footing of a mere guess, how the jury looked at the matter and what they intended by their finding. Counsel for the plaintiffs demanded an exemplary verdict, and the adequacy of the discussion of the case in the charge depends in some measure upon what is urged in the address of counsel: see *Blank vs. Barnhart*, 17 Pa. Super. Ct. 214, 217; *Com. vs. Wertheimer*, 23 id. 192, 194; *Com. vs. Penrose* 27 id. 101, 110.

1. In order to lay ground for the recovery of punitive damages, it is not necessary that the declaration expressly claim such; it is enough if the pleadings and evidence entitle the plaintiff to ask them: *Greeney vs. Water Co.*, 29 Pa. Super. Ct. 136, 140. It cannot be successfully denied that the averments of the declaration in this case are sufficient, under the authorities, to sustain an exemplary recovery, and it would seem, and for present purposes may be assumed, that there is evidence justifying the submission of the question of such damages to the jury.

2. If that is so, then there was no error in the admission of the examination of the defendant as to his financial ability, or in negating his point forbidding the jury to allow punitive damages.

3. But in submitting this matter to the jury, it was essential under all our decisions, of which *Traction Co. vs. Orbann*, 119 Pa. 37, 44, et seqq., may be cited as typical, and of which *Rider vs. W. & P. Co.*, 251 id. 18, 26, affords a recent recognition, that the jury be informed by the Court as to the conditions which circumscribe the allowance of any but compensatory damages. This requisite was not met in the present case. It went to the jury upon the evidence without any-

thing to guide them in its consideration on this point. In the absence of what was needful in the charge for that purpose it is to be feared that the testimony as to defendant's financial ability (which had a legitimate place in the case only as bearing upon the extent of punitive damages to be allowed under proper instructions) was an invitation to the jury to assess damages measured, not simply by the injuries inflicted, nor by the degree of carelessness, etc., characterizing the defendant's conduct, but at all events by his ability to pay,—a wrong basis, of course, and an error probably prejudicial to defendant and therefore demanding the grant of a new trial.

4. After what has been said it is unnecessary to discuss the contention of defendant's counsel relative to a hasty remark made by one of plaintiff's counsel in his address to the jury, objected to by defendant at the time, and made the ground of an application for the withdrawal of a juror and continuance of the case, which was declined.

The rule to show cause is made absolute.

TUCKEY vs. TUCKEY.

Divorce—Desertion—Offer to Resume Marital Relations.

A divorce on the ground of desertion will be refused and the libel dismissed where the evidence shows that within two years after the alleged desertion the respondent returned to her husband's home and offered in good faith to resume marital relations with him, which he refused.

In the Court of Common Pleas of Berks County.

No. 91 August Term, 1917.

Divorce: Exceptions to master's report.

Walter S. Young for libellant and exceptions.

Lee Friday for respondent.

J. H. Zweizig, master.

Opinion by Wagner, J., March 4, 1918.—The ground upon which this libel in divorce is founded is that the respondent, on January 24, 1915, wilfully and maliciously deserted libellant and absented herself from his habitation without reasonable cause for so doing.

The Master found that in May, subsequent to the alleged desertion, the respondent went to the home of libellant to resume marital relations with him; that libellant refused to receive her, and that, therefore, since the law gave her two

years' time within which to repent of her desertion, if such under the facts of this case it was, that his refusal to receive her was a virtual turning her out of doors, and that consequently the allegation of wilful and malicious desertion had not been made out by the libellant.

An examination of the testimony establishes these facts: The libellant and respondent were married on February 12, 1907. From that time until September, 1913, they lived happily together. Then the libellant rented a part of their dwelling house, No. 349 Schuylkill Avenue to his uncle, William Ammon, who, with his wife, then came to live with them. From this time difficulties and troubles between libellant and respondent began which resulted in the respondent leaving the libellant four different times between September, 1913 and January 1915. After she left the fourth time, that is, on January 24, 1915, she brought an action in our Court for support. At the hearings on this case the Court endeavored to get libellant and respondent reconciled and asked the attorneys to use their efforts to this end.

The respondent upon the advice of her counsel in May, 1915, went to the home of libellant to take up with him their marital relations. This advice given by her counsel to her, and which she followed, was in accord with the instructions and purposes of the Court given at the time of the hearings in the desertion case, to get these two people together. There is nothing to show that the instructions given to her were other than in good faith, or that she acted other than in good faith when she went to his home, as she alleges, to be reconciled. This good faith we find as a fact from the evidence.

We need not consider any evidence other than that of the libellant to show with what spirit this attempt at reconciliation was met by him. Libellant admits that the respondent came back to him on May 20, 1915. That she entered his home; that he refused to permit her to remain; that he, after her return to him, practically removed all the furniture, and did not even leave a bed in the house for her and their two small children. This evidence illustrates his indifference and spirit. (Notes of Testimony, pp. 10, 11):

"Q. You left no bed for her to lie on? A. No; she was getting her money from court.

Q. You left no bed for her or the two children to lie on? A. There was some bedding there.

Q. She was there for nine days? A. I cannot tell how long.

Q. And slept on the boards until sick? A. I don't know; I was not there.

Q. The neighbors brought in a cot for her to lie on? A. I was not there; I went away.

Q. During the nine days she was there you came and ordered her out? A. I told her to move, that I had rented the house.

Q. Then she finally left? A. I suppose so.

Q. You took your furniture away while she was there, then after you had ordered her out, she left and after she left you took some of your furniture back into the house again? A. Yes.

Q. From that time until April, 1917, you lived in that house? A. Yes.

Q. But at the time that was the only home where you were living? A. Didn't the Judge make an order of \$7.00?

Q. I am not asking what the Judge made. When she came back and offered to live with you on May 20, 1915, the only home you had for her to go into was the home at 349 Schuylkill Avenue? A. I did not have that; I had rented it.

Q. Your furniture was there, and she came in, and after she came in, you brought two teams and took the furniture away and ordered her out, and after she left, you brought your furniture back again. A. Yes."

His evidence so clearly shows a turning out of the wife who came to his home to be reconciled, that we can not do otherwise than find the same as the Master did, that there was no wilful and malicious desertion on the part of the respondent.

This finding makes it unnecessary for us to consider the evidence on the question of the conduct of the libellant towards the respondent; that is, whether libellant's treatment of respondent was such that she was justified in leaving him.

Exceptions to the Master's report are dismissed, and it is ordered and directed that the libel, in accordance with his recommendation, be dismissed at libellant's costs.

NATIONAL UNION BANK vs. FRANKHAUSER.

Real Estate—Conveyance by Husband to Wife—Presumptive Gift—Creditors—Evidence.

[Where a husband transfers either real or personal property to his wife, the presumption is that it is a gift, and as to persons who are creditors at the time it is void and fraudulent.] In a contest with creditors of the husband it is necessary for the wife to establish that the conveyance was to secure her debt, and every element necessary to sustain her claim must be established by clear and satisfactory evidence.

Evidence—Oral Testimony—Question for Jury.

Where the establishment of a question of fact depends upon oral testimony, the credibility of the witnesses is for the jury alone, and it is their exclusive province to determine whether, from such testimony, the fact in dispute has been established, even though the testimony is uncontradicted.

In the Court of Common Pleas of Berks County.

No. 50 February Term, 1917.

Rules for new trial and for judgment n. o. v.

Harry F. Kantner, William B. Bechtel and Frank S. Liy-ingood for defendant and rules.

C. H. Ruhl and E. Carroll Schaeffer for plaintiff.

Opinion by Wagner, J., April 1, 1918.—The issue in this suit was whether the conveyance of the title to the premises 38 South Eighth street, 1338 and 1348 Green street, Reading, Pa., made by Fremont W. Frankhauser to Sallie F., his wife, was with intent to hinder and delay or to cheat and defraud the creditors of Fremont W. Frankhauser.

It was admitted that since 1911 and also at the time of the conveyance Fremont W. Frankhauser was indebted to the plaintiff in the sum of about \$6,000. The deed was dated February 5, 1914, and was recorded on November 1, 1915. Plaintiff obtained judgment on its indebtedness to No. 41 May T., 1916, J. D. Execution was issued, and the said properties were levied upon as the property of Fremont W. Frankhauser. At the sheriff's sale they were purchased by the plaintiff, to whom the sheriff executed and delivered deeds therefor. The jury decided the issue in favor of the plaintiff. Defendant has filed reasons for a new trial and for judgment n. o. v.

Defendant contended that the properties had been conveyed to her by her husband in consideration of an indebtedness by him to her to the full value thereof. As this was a conveyance by the husband to the wife, it was presumptively a gift from him to her. In *Waslee vs. Rossman*, 231 Pa. 219, on p. 228, we have: "Where a man transfers either real or personal property to his wife, the presumption is that it is a gift from him to her;" *Wilson vs. Silkman*, 97 Pa. 509; *Bowser vs. Bowser*, 82 Pa. 57; also see *Edwards vs. Edwards*, 170 Pa. 212." See also *Curtis & Co. vs. Olds*, 250 Pa. 320. This being a contest with a creditor at the time of the conveyance, we start with this presumption of a gift. Such a gift as to persons who are creditors at the time of the gift is void and fraudulent. In *Wilson et al. vs. Silkman*, 97 Pa. 509, on p. 512, we have: "The contest was with her husband's creditors, and if the judgment was not founded upon a valuable consideration, however good it might be against him or his estate, it would be fraudulent and void as to contemporaneous creditors." See also *Thomson vs. Dougherty*, 12 S. & R. 448, 455; *Curtis & Co. v. Olds*, supra. In a contest with the creditors it is necessary for the wife to establish that the conveyance was to secure her debt: *Wilson et al. vs. Silkman*, supra; *Benson*

and West vs. Maxwell, 105 Pa. 274, 277; Billington vs. Sweeting, 172 Pa. 161, 164; 20 Cyc. 603, 604, 754, "and every element necessary to sustain the claim of a married woman as against her husband's creditors, must be established by clear and satisfactory evidence: Wilson et al. vs. Silkman, 97 Pa. 509;" Billington vs. Sweeting, supra; Benson and West vs. Maxwell, supra; Wilson et al. vs. Silkman, supra; Heiges vs. Pifer, 224 Pa. 628.

The determination of the issue depended upon whether or not the wife established by clear and satisfactory evidence that the conveyance of these properties was in consideration of the husband's indebtedness to her. This is made clear by our affirmance of defendant's first point. In it we were asked to and did so charge that if the jury found the various items of indebtedness from the husband to the wife existed as testified to by them, that that would constitute a good and valuable consideration for the transfer of the three properties by her husband to her, and that then the verdict should be for the defendant.

Defendant's fourth reason for a new trial assigns as error the failure of the court to affirm defendant's second point. This point is taken from Snayberger vs. Fahl, 195 Pa. 336, where the court, on page 343, say: "The motive of the creditor and not the intent of the debtor determine the fraudulent character of the transaction." What was there said must be considered in the light of the facts in that case. The transfer there was not from husband to wife, but from a wife and her husband to a third party. It was admitted that this third party, the grantee, had given full value for the transfer of the property to him. Therefore there was no legal fraud and the question then was whether there was actual fraud in the transfer even though a full consideration had been paid. It was on this status of the case that aforesaid rule was stated. In the present case the only question was one of legal fraud; that is, whether the conveyance by the husband to the wife was without an adequate consideration. Defendant's second point therefore had no application to this case and was properly refused.

The ninth reason for a new trial refers to that portion of the charge where we stated that when a man transfers real or personal property to his wife that the presumption is that it is a gift from him to her. The authorities already cited dispose of this reason.

The tenth reason for a new trial refers to that portion of the charge where it was stated: "The mere fact that it is not denied is not sufficient for you to accept it as a fact. You must pass upon the credibility of the witnesses even upon matters which may not be denied on the other side." This must be

considered in connection with and as it bears upon what we said immediately before and after this part of the charge assigned as error. We first stated the contention of the defendant, that is, that she had received \$550 from her father, and that of this amount she gave \$200 to her husband, and that it was given with the distinct understanding that it was to be paid back with interest. We then said, "Whether such was the case is for you to determine from the evidence;" followed by the part complained of. After this we stated, "If you find that her story is true, and that interest was to be paid, then you will find that the amount of that one item at the time of the conveyance would be something like \$600 with interest for about thirty-four years." We then referred to defendant's other alleged items of indebtedness against her husband.

Defendant attempted to establish the fact of indebtedness by her oral evidence and that of her husband. This indebtedness was the matter in dispute. The fact that plaintiff could not deny or contradict this oral evidence did not make it an established or admitted fact, as was contended for by defendant's counsel at the argument and also in their brief of argument on the rule for judgment n. o. v. Their credibility was for the jury. In *Second Nat'l Bk. vs. Hoffman*, 229 Pa. 429, on p. 433, Mr. Justice Brown says: "We have many times said that when the establishment of a question of fact depends upon oral testimony, the credibility of the witness or witnesses is for the jury alone, and it is their exclusive province to determine whether, from such testimony, the fact in dispute has been established: *Grambs vs. Lynch*, 20 W. N. C. 376; *Harlow vs. Borough of Homestead*, 194 Pa. 57; *Bartlett vs. Rothschild*, 214 Pa. 421; *Fry vs. National Glass Co.*, 219 Pa. 514." Also in *Duffy vs. York Haven W. & P. Co.*, 233 Pa. 107, on page 110, we have, "However indisputable may be the proof, when it depends upon oral testimony it is nevertheless the province of the jury to decide: *Reel vs. Elder*, 62 Pa. 308." See also *Lindeman vs. Pittsburgh Rys. Co.*, 251 Pa. 489, 493. The defendant and her husband, that is, the parties to this alleged legal fraud, were the only persons who testified to this indebtedness. The jury had to take into consideration not merely their evident interest, but also how they impressed them as to the truth of their evidence by their manner of testifying and otherwise. The defendant and her husband were both persons above the average intelligence. Upon direct examination they very readily and promptly answered questions.

The defendant contended that upon the date of their marriage she had given to her husband \$200; that it was given with the distinct understanding that the husband was to pay it back with interest, and that she was able to give this to him because she had received on that day from her father \$550.

This was corroborated by the husband. There was no note or other evidence corroborative of this. She also testified that of the amount of \$1,809.91 which she received on April 9, 1898, out of her father's estate she had paid to Mr. Spatz an indebtedness of \$500 for her husband upon the agreement that this sum was to be repaid to her by her husband with interest. This she claimed had not been paid. She offered in evidence a stub in a check book upon which was marked \$500 paid to Mr. Spatz. Neither she nor her husband could state for what this indebtedness was. Outside of their own evidence there was nothing to show that it actually was a debt of the husband and not of the wife, if the amount was paid. The check was not produced.

Then she and her husband testified that in the building and sale of three houses wherein she claimed her husband had acted as her agent there had been a profit of \$600 on each house, a total of \$1,800. Again there was nothing but their statement to show that there actually was a profit. Even if there had been a profit as alleged, of \$1,800, under the facts of this case it is a question whether it could be considered as her money: See *Keerney vs. Good*, 21 Pa. 349. There were no accounts or books shown which threw any light upon whether or not there was profit or loss in the building transactions. When he was asked (N. of T., p. 60), "Where are those accounts?" he answered, "Bless my soul, when we moved, everything was destroyed." When plaintiff's counsel asked the defendant questions which would have thrown light upon this alleged indebtedness, her answers generally were that she did not know. When she was asked (p. 37) what the debt of Dr. Frankhauser to Spatz was, she answered, "I don't know just now." When asked what each of these houses cost her, she says, "That I can't say unless they have the papers there. I can't say that just exactly unless I look." On p. 38 she answered, "I don't know that I could tell what they really did cost." When asked as to the money that was put in she again answered she could not remember, it was so long ago. I know we had a profit of \$600, but I couldn't say the cost." When asked where the money was secured to build the houses, and from whom it was borrowed, she again said she could not answer. When asked whether money was raised on the doctor's own notes, she answered (p. 39), "I guess he did. I don't know." When questioned as to the very recent written instrument of August 21, 1916, acknowledged by her before a notary public, wherein she declared she had no interest or ownership whatever in 1338 Green street until sometime after February 25, 1914, the date of a mortgage given by her husband, she said that she had no recollection whatever about it, did not recollect it, and refused to admit her signature to that

paper, although it clearly was her signature. It is not necessary to go further into the evidence of the defendant and her husband to make clear that when the jury took into consideration their interest, and the substance and manner of their testimony, that it did not indulge in a "capricious disbelief" when it refused to credit the oral evidence of defendant and her husband.

Rules for a new trial and for judgment n. o. v. discharged.

EDMUNDS, et al., vs. PERPETUA, et al.

Contracts—Personal Property—Sale After Inspection—Delivery—Attempted Rescission for Defect in Quality—Judgment n. o. v.

Plaintiffs sued to recover the contract price of 200 barrels of potatoes. Defendants contended that they had bought the potatoes from sample barrels, and that the potatoes shipped were of inferior quality and were for that reason refused. Defendants' testimony showed that their agent called at plaintiffs' receiving station in Philadelphia, where he saw a car of potatoes containing probably 200 barrels; that he examined them, opening four or five of the barrels, and found their condition and quality excellent; that he was told by plaintiffs' agent that the potatoes in the car were supposed to be "of one mark of potatoes, R. I."; that he then purchased 200 barrels of these potatoes and received from plaintiffs a slip evidencing the purchase; and that defendants' agent ordered the railroad company to ship the potatoes to defendants at Reading, attaching the slip to the bill of lading to enable the railroad company to get the potatoes from plaintiffs. The jury found a verdict for defendants. On rule for judgment n. o. v., **Held:** that the potatoes were not bought by sample but upon inspection; that there was no evidence that the potatoes delivered were not the potatoes purchased; that defendants' evidence showed a delivery in Philadelphia at the time of the purchase and that defendant had no right to rescind for breach of warranty of quality, had there been one, but could only claim damages therefor; and that plaintiff was entitled to judgment n. o. v.

In the Court of Common Pleas of Berks County.

No. 35 November Term, 1916.

Rule for new trial and for judgment n. o. v.

Cyrus G. Derr and Walter B. Freed for plaintiffs and rules.

Henry P. Keiser for defendants.

Opinion by Wagner, J., April 1, 1918.—Plaintiffs have obtained rules for new trial and for judgment n. o. v. In their statement they aver that suit is brought against the defendants to recover the sum of \$400, with interest thereon from July 12, 1916. That the plaintiffs are engaged in the wholesale fruit and produce business in Philadelphia. That on the aforesaid date at Philadelphia, an oral agreement was made

between plaintiffs and one Thomas G. Dieval, the duly authorized agent and broker of the defendants, by which the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy 200 barrels of potatoes at the price of \$2 a barrel, making a total of \$400. That in pursuance of this oral agreement plaintiffs did, at the time of the purchase, deliver the potatoes to the defendants, and the defendants then and there accepted them. In defendant's affidavit of defense they admit that Thomas Dieval was their agent and broker. That he, on July 12, 1916, at Philadelphia, purchased from the plaintiffs 200 barrels of potatoes at the price of \$2 per barrel, and aver that the potatoes so purchased were sold by means of sample barrels, which sample barrels were of good, marketable quality, and had a mark on the barrels of "R. I." That all the 200 barrels so purchased were to be of the kind and quality of the samples shown by Martin to Dieval, and were to bear on the barrels the mark "R. I." Defendants deny that the plaintiffs on July 12 delivered 200 barrels of potatoes of the kind and quality of the sample shown and having a mark "R. I." on all the barrels, and state that when the potatoes arrived at Reading the defendants went to the Freight Station of the Railroad Company, made an examination of the potatoes and found that at least one-half of the barrels did not have the initials "R. I." on them. Also that large quantities of the potatoes were rotten and not of good and marketable quality. That they thereupon refused to accept the goods, and on July 13 notified plaintiffs of their non-acceptance for the reason that they were not of the kind and quality of the sample, and that they were at the Pennsylvania Freight Station, at Reading, at the disposal and order of the plaintiffs.

Thomas G. Dieval, defendants' witness, testified that he, with Casimo Perpetua, one of the defendants, on July 12, 1916, went to the Pennsylvania Freight Receiving Station at 13th and Market Streets. That the plaintiffs there have platform space from which they sell their goods. That he and Mr. Perpetua there met Mr. Martin, agent of the plaintiff company, and that he (Dieval) purchased for the defendants 200 barrels of potatoes. In answer to the question put to him by defendants' counsel, "Did you see and sample the barrels of potatoes?" he said, "I saw the car there, and in the car potatoes marked 'R. I.' (N. of T., p. 13)." Perpetua testifies that the potatoes were in the car "on the platform on the space allotted to Woodward & Company, as they do for all receivers (p. 16)," and that this was the place where the potatoes were sold. Dieval testifies, in answer to a question by defendants' counsel (p. 14):

"Q. How many barrels of potatoes were in this particular car that you saw that day? A. I couldn't say that. There

may have been 200 barrels. I think Mr. Martin said 200 barrels."

He further testifies that they examined the potatoes, opened four or five of these 200 barrels, and that "the condition was good; the quality was excellent." That he knew the shipper, and knew the goods that shipper represented. Casimo Perpetua testified the car was shown to him by Mr. Martin; that Mr. Martin said (p. 16), "they were supposed to be all of one mark of potatoes, 'R. I.;" that he made an examination of four or five barrels, and that they were good potatoes and that none of them were rotten. It will be seen from this evidence, which corroborates plaintiffs' evidence, that these potatoes were not sold by sample as averred in the affidavit of defense, but upon inspection.

The next question to be determined is, did the plaintiffs deliver to the defendants these potatoes at the time defendants purchased them after inspection, and did the defendants at the same time accept them? It will be noted that the place where the potatoes were at the time of the sale was on the platform of the Pennsylvania Railroad Company upon a space allotted to plaintiffs by the Railroad Company. Dieval testifies that immediately after the inspection and purchase, he received a slip from Martin, plaintiffs' agent, (plaintiffs' exhibit "A") wherein, inter alia, we have R. I., 200 barrels, \$1 potatoes. Plaintiffs contend that upon the giving of this slip to the defendants they parted with the control of these 200 barrels, and that these 200 barrels were then and there on the platform accepted by the defendants. That defendants after this acceptance shipped the potatoes to themselves at Reading, and that having done so, it was then too late for them to refuse the potatoes at Reading. It is only as this contention is established by defendants' witnesses, that judgment n. o. v. can be entered for the plaintiffs.

Dieval testified that upon the receipt of this slip it was attached to the bill of lading "so that the checkers of the railroad people could go to Woodward & Company's space and get those 200 barrels of potatoes (p. 14)." He says, in answer to a question by defendants' counsel (p. 25):

"Q. What does the railroad company do? A. They are supposed to see that I get the potatoes shipped that that slip calls for."

He further said that with that slip anybody then could have shipped or loaded the potatoes. That his deputy clerk could have gone ahead and loaded these potatoes in the car. That the Railroad Company would have given him a car and he could have loaded them and then gone and made out this bill of lading. That his deputy clerk sometimes did it, and "when he doesn't it is something we can have done by the

railroad company for us (p. 26).” In this case Mr. Dieval’s brother, who was his authorized deputy, acted for him, attended to the shipping, made out the bill of lading (plaintiffs’ Exhibit “B”) and shipped these goods to the defendants in Reading.

The bill of lading designates T. G. Dieval as the shipper. There is nothing in the evidence to show that in the shipping of these goods or in any matter in this transaction, Dieval acted other than as the agent for the defendants, or that in the shipping thereof the railroad company did anything other than as directed by the shipper. It is plain from this evidence that complete control of the potatoes was given up by plaintiffs and that they were accepted by the defendants after this purchase upon inspection. That is, the potatoes were accepted on the Receiving Station at Philadelphia by the defendants at the time of the purchase. The defendants after having thus accepted the potatoes could not then ship them to Reading as was done by their agent, and after their arrival, rescind the contract. If defendants’ agent, Dieval, or their agent the railroad company, failed to ship to them at Reading the identical potatoes purchased and accepted, this did not warrant a rescission of the contract by defendants. There is no evidence from which it can be determined whether Dieval shipped the identical potatoes purchased or whether others were shipped. If they were the identical potatoes, then again the contract could not be rescinded at Reading.

We have at Philadelphia on the platform an executed sale of these potatoes. Even then if, as defendants contend, there was an express warranty as to quality, the defendants did not have upon the arrival of these goods at Reading, a right to rescind the contract for breach of this alleged warranty. In *Drovers’ & Mech. Nat’l Bank of Baltimore vs. Newton*, 6 Kulp 193, we have: “In Pennsylvania it is held that on an executed sale of a specific chattel upon an express warranty of quality, the buyer has not the right to rescind the contract for breach of warranty and return the chattel, but if he has paid the price, may sue on the warranty and recover damages, or if he has not paid the price, may offset the damages.” In *Freyman vs. Knecht*, 78 Pa. 141, it is held: “Where there is a warranty and no fraud or agreement to return, the vendee cannot rescind the contract after it has been executed; his only remedy is on the warranty.” The defendants do not aver, neither have they offered in evidence any proof of fraud or deceit in this sale. In *Wasserman vs. Fleisher*, 249 Pa. 29, on p. 31, Mr. Justice Mestrezat says: “There is no averment or proof of fraud or deceit in the sale which had been fully executed, and, therefore, the plaintiff could not rescind the contract for breach thereof and recover back the purchase-

money." If there was an express warranty, then defendants only remedy was to set off their damages in this suit for the recovery of the purchase price.

Rule for new trial discharged. Rule for judgment n. o. v. made absolute; and it is directed that judgment n. o. v. be entered in favor of the plaintiffs for \$400, together with interest from July 12, 1916, to wit, for \$441.

FELIX vs. BREY

Landlord and Tenant—Dangerous Structure—Removal by Landlord at Instance of Fire Authorities—Eviction.

Plaintiff leased to defendant a property with a shedding upon it, the lease providing that the lessee should make needful repairs. During the term, plaintiff was notified by the fire authorities that the shedding was dangerous and must be made safe or removed. Defendant neglected to make the repairs and plaintiff entered upon the premises and removed part of the shedding. Defendant vacated the premises and refused to pay rent, claiming an eviction. At trial plaintiff contended that defendant had consented in advance to plaintiff's action or had subsequently by his acts waived it as an eviction. The jury found a verdict for defendant. Rules for new trial and for judgment n. o. v. discharged.

Same—Eviction—Waiver—Question for Jury.

Any material interference by the landlord with the tenant's quiet and peaceable possession and enjoyment of the leasehold in whole or in part constitutes an eviction; which is a defence in a suit for rent.

Every contract is presumed to be made with reference to the existing law of the land, but non-interference with the tenant's term is a condition precedent to his liability for rent. The rule is that no amount of hardship or impossibility or illegality will avoid the bar of a condition precedent unperformed.

The question of waiver of the effect of the eviction was for the jury.

In the Court of Common Pleas of Berks County.

No. 69 March Term, 1917.

Rules for new trial and for judgment n. o. v.

George J. Gross for plaintiff and rules.

John B. Stevens for defendant.

Opinion by Endlich, P. J., May 6, 1918.—The defendant was in possession of a certain property, with a shedding upon it, under a lease from the plaintiff which required the lessee to make needful repairs. While the term created by the lease was still unexpired, the plaintiff was notified by the state fire authorities that the shedding was dangerous and must be either made safe by adequate repairs, or removed. This notice being brought to the knowledge of the defendant and no repairs being made by him, there resulted certain negotiations

between him and the plaintiff looking to the reconstruction of the shedding and a continuance of the tenancy. The negotiations, however, after several months came to naught, the parties failing to agree. In the meanwhile there were further demands from the state and city authorities in the line of the first notice, and at length the plaintiff entered upon the premises and removed part of the shedding. Thereupon there were further negotiations between the plaintiff and the defendant, who undertook to deal with the authorities in an endeavor to induce them to change their demand. These efforts, however, were also unsuccessful, and eventually the defendant removed from the premises, leaving five months of rent at the rate of \$8 per month unpaid. This action was brought to recover that amount as rent remaining due. At the trial of the case the defence alleged an eviction, the reply to which allegation on the part of the plaintiff was that the defendant had consented in advance to the plaintiff's entry upon the premises, or at all events had subsequently waived the effect of what was done by plaintiff as an eviction if it amounted to that. The case was submitted to the jury upon the questions whether there was an eviction or not, and if so whether the plaintiff's interference with the leasehold was either consented to in advance or subsequently waived by the defendant. The verdict was for the defendant, and plaintiff obtained these rules.

There is no doubt, under *Kelly vs. Miller*, 249 Pa. 314, and similar cases, that any material interference by the landlord with the tenant's quiet and peaceable possession and enjoyment of the leasehold in whole or in part constitutes an eviction, nor, under *Wilson vs. Sale*, 41 Pa. Super. Ct. 566, and many other authorities, that an eviction is a defence in a suit for rent. The verdict, looked at in the light of the charge, see *Mintzer vs. Hogg*, 192 Pa. 137, 144; *Smith vs. Shields*, 194 id. 635; *Kaechele vs. Traction Co.*, 15 Pa. Super. Ct. 73, 76, affirms such eviction, and it is now conceded on the part of plaintiff's counsel that there was in this case what he calls a "technical" eviction; nor is there understood to be any further contention that what was done by the plaintiff was consented to in advance by the defendant. It is claimed, however, that under the law the notice of the fire authorities to the plaintiff justified her in taking the steps that she did take, and that the subsequent attitude and actions of the defendant himself waived any rights he might otherwise have had by reason of the eviction. It is, of course, true that every contract is presumed to be made with reference to the existing law of the land: *Snyder vs. Leibengood*, 4 Pa. 305, 308; *Western Nat. Bank's App.* 102 id. 171, 184; *Burnett vs. R. R. Co.*, 176 id. 45, 48; *Silk Mfg Co. vs. Reilly*, 187 id. 526, 532. But it must

not be overlooked that non-interference with the tenant's term is a condition precedent to his liability for rent; and the rule is that no amount of hardship or impossibility or illegality will avoid the bar of a condition precedent unperformed: *Allegheny City vs. Ry. Co.*, 159 Pa. 411, 419. Under this rule the circumstance that plaintiff was proceeding under pressure from the authorities can hardly avail her as a reply to the defence set up, even though the continuance of the shedding in its defective state was illegal. It would seem, on the contrary, that unless the effect of the eviction was indeed waived by the defendant, there could be no recovery against him in this action by the plaintiff. The question of waiver, however, is ordinarily for the jury upon the evidence: *Eckert vs. R. R. Co.*, 211 Pa. 267, 277. It can be for the Court only where the facts and the possible inferences from them are undisputed: *Pittsburg C. Co. vs. R. R. Co.*, 227 Pa. 90, 99. Under the evidence in this case, admitting of opposite interpretations, it was for the jury and not for the Court, and it would be an unwarranted assumption on the part of the latter to decide that question either for the jury in advance of the verdict, or after the same notwithstanding it. Moreover, the only error alleged to have been made in the trial being the refusal of the Court to direct a verdict in favor of the plaintiff, there is, in view of what has been said, nothing which would afford just ground for a new trial; and hence,—

The rules to show cause are discharged.

YODER vs. HERTZOG

Chancery Rule of Evidence—Act 28 May, 1913, P. L. 358—Equitable Matters in Actions at Law.

Act 28 May, 1913, P. L. 358, abolishes the chancery rule of evidence necessary to meet a responsive answer, which therefore becomes inapplicable to equitable matters set up in cases at law, except where an attempt is made to reform or overthrow a written instrument.

Plaintiff's Statement—Allegata and Probata—Interpleader.

The rule as to the agreement between allegata and probata obtains in an interpleader proceeding, but it can hardly be invoked to preclude proof of purchase by the plaintiff through an agent under an allegation of purchase by the plaintiff. The contract of an agent of an undisclosed principal is the contract of the latter.

In the Court of Common Pleas of Berks County.

No. 17 October Term, 1916.

Rule for new trial.

Joseph R. Dickinson for defendant and rule.

William Kerper Steyens for plaintiff.

Opinion by Endlich, P. J., May 6, 1918.—About April 2, 1914, certain laundry equipment was levied on under an execution issued by the defendant, Alice Hertzog, against Marion Hertzog, her divorced husband, plaintiff's son. The property being levied upon as the property of the son, the plaintiff claimed it as owner. This interpleader was thereupon instituted to determine the controversy, the plaintiff in her statement averring "that she derived title to the said goods and chattels by purchase with her own money." On the trial it appeared that at the time of the purchase of the laundry the plaintiff was quarantined in her house and had no direct dealings with the vendor. The transaction was conducted between the vendor and the plaintiff's son, the latter acting in his own name and disclosing to the vendor no interest on the part of the plaintiff in the purchase and transfer. There was, however, an abundance of testimony from which the jury was at liberty to infer that in truth and in fact the son was acting for his mother; that she furnished the money for the purchase; that she took charge of the property when given up by the vendor and operated the laundry from that time on; that she employed the help and paid for their services; that she bought the supplies and paid for them; that she kept the books—in short, that she was the real party to the transaction, used her son as her agent in its consummation, and was the owner of the property in question in this proceeding. The case being submitted to the jury upon the issue of ownership under the evidence, they found a verdict in favor of the plaintiff, and the defendant is now here asking for a new trial.

The grounds upon which this application was at the argument based by defendant's counsel are (1) that, as already indicated, the plaintiff in her statement claimed to have purchased the property, which, it is contended, means a purchase by herself directly and not through an agent, and that the testimony failed to make out that allegation—and (2) that at the most the evidence may be interpreted as constituting the son a trustee of the legal title for the plaintiff, and that in order to do this the conclusion must follow from the testimony positively and indubitably, and not rest upon a mere preponderance of the evidence which in the charge the jury was told should be decisive of their finding.

As regards this latter contention, it is to be noted that Act 28 May, 1913, P. L. 358, abolishes the chancery rule of evidence referred to in equity cases. Necessarily, therefore, it becomes inapplicable to equitable matters set up in cases at law, except where it is attempted to reform or overthrow a written instrument, which is not this case. But the question under the evidence here is not one of trusteeship, but of special agency. It cannot be doubted that the rule as to the

agreement between allegata and probata obtains in an interpleader proceeding: See *Leach vs. Alexander*, 12 Pa. Super. Ct. 377. This rule, however, can hardly be invoked to preclude proof of purchase by the plaintiff through an agent under an allegation of purchase by the plaintiff. The contract of an agent of an undisclosed principal is the contract of the latter: *Brown vs. Title & Trust Co.*, 174 Pa. 443, 448, provable by parol: *Hall vs. White*, 123 id. 95; *Brodhead vs. Reinhold*, 200 id. 618. It does not seem open to serious dispute that, under the plaintiff's statement, she was at liberty to prove a purchase by herself through her son as her special agent for the purpose. If the effect of the transaction between vendor and vendee were involved, much of what the defendant has advanced might be pertinent. But under the circumstances of this case and as between plaintiff and her son, it cannot be so regarded. There appears to be no other question in the case, and as this one must be resolved adversely to the defendant's contention—

The rule to show cause is discharged.

HARTGEN vs. HARTGEN, admr., et al.

Equity Practice—Exceptions to Answers—Act 28 May, 1913, P. L. 358—Responsive Answer as Evidence.

In a suit in equity, an exception to defendants' answer that it does not indicate that the averments are upon the personal knowledge of each defendant, or of which of the defendants, and is therefore not responsive in the sense of being evidence in defendants' favor, will be dismissed, since the equitable rule which makes a responsive answer evidence for the defendant is abolished by Act 28 May, 1913, P. L. 358.

Exceptions to Answers—Averments of Conclusions—Equity Rules 37 and 17.

An answer in equity averring that the transfer of the money in dispute was pursuant to a gift, but which avers no facts from which it can be determined whether the transfer was a gift, is insufficient and an exception thereto will be sustained.

An exception to an answer that it states conclusions will be dismissed where the corresponding paragraph of plaintiffs' bill itself contains a statement of conclusions, in violation of Equity Rule 17; for the defendant is not obliged to answer conclusions.

In the Court of Common Pleas of Berks County: In Equity.

No. 1217 Equity Docket, 1917.

Exceptions to answers.

Harvey F. Heinly for plaintiff and exceptions.

John B. Stevens and Harry J. Dumn for defendants.

Opinion by Wagner, J., May 6, 1918.—A joint answer was filed by Mary Hartgen, J. Fred. Hartgen, Joseph A. Hartgen, Edward A. Hartgen, William J. Hartgen, Mary E. Hartgen, George P. Hartgen and Leo B. Hartgen, and a separate answer by the other defendant, Jacob Hartgen, administrator of John Hartgen, deceased, to plaintiff's bill. The plaintiff filed exceptions to the fourth paragraph in the answer of Mary Hartgen, et al., and to the fourth and sixth paragraphs in the answer of Jacob Hartgen, administrator of John Hartgen, deceased.

An examination of the fourth paragraph in plaintiff's bill and the answer thereto of Mary Hartgen, et al., shows that all of the material averments in the bill are answered in full. The exception to the answer is that it does not indicate that the averments are upon the personal knowledge of each and every defendant or of which of said defendants. This is the gist of the seven reasons for this exception, and resolves itself to this: that the answer is not responsive to the bill. The basis of this exception as shown by plaintiff's brief of argument is that he considers "this is important now as later on the question of the responsiveness of the answer may arise." In support thereof he cites: "His answer is not responsive, in the sense of being evidence in his own favor: *Riegel vs. Insurance Co.*, 153 Pa. 134." This equitable rule which makes a responsive answer evidence for defendant, is abolished by the Act of May 28, 1913, P. L. 358, which provides:

"The rule in equity that the averments of a responsive answer must be overcome by the testimony of two witnesses, or of one witness sustained by corroborating circumstances equivalent to the testimony of another witness, in order to entitle plaintiff to a decree, is hereby abolished as to proceedings hereafter to be begun."

As far therefore as the evidential value of the answer is concerned, it is immaterial whether the averment of a fact is upon personal knowledge, or upon information and belief.

The first and second reasons of the exception to the fourth paragraph of the answer of Jacob Hartgen raise the same question of responsiveness, and in view of what we have already said need no further consideration.

The third reason of the exception is: "his statement as to said alleged gift is a conclusion of law and not a statement of facts upon which such conclusion could be based." Defendant's answer upon the gift of the \$9,088.53, is: "I am informed, have made a careful investigation, and I believe and therefore aver that said transfer was pursuant to a gift which my deceased brother John Hartgen in his lifetime had made to my sons Edward A. Hartgen and George P. Hartgen." Here the defendant avers no fact whatever from which it can be

determined whether the transfer was a gift and is consequently insufficient: Equity Rule 37; Petition of St. George's Church, 244 Pa. 410, 413; 16 Cyc. 308.

The sixth paragraph of plaintiff's bill relates specially to Jacob Hartgen, administrator. It consists of a statement of several conclusions, followed by a statement that he has failed to file a full inventory as administrator. In averring conclusions, plaintiff violates Equity Rule 17, in that that part of the bill does not contain a succinct statement of the facts upon which the plaintiff asks relief. Even if the answer to this statement of a conclusion is an averment of a conclusion, the plaintiff has nothing upon which to complain or file exceptions, for the reason that the defendant is not obliged to answer these conclusions. The part of the answer that relates to the allegation in the bill that Jacob Hartgen, administrator, has failed to include in his inventory filed as administrator the \$9,088.53 in dispute, raises the question of the jurisdiction of this court to pass upon that question. The reasons of the exception to the sixth paragraph of the answer of Jacob Hartgen, administrator, have no merit.

The exception to the fourth paragraph of the answer of Jacob Hartgen, administrator, for the reason that (3) his statement as to said alleged gift is a conclusion of law and not a statement of facts upon which such conclusion could be based, is sustained. As to all the other reasons the exceptions are dismissed. And it is directed that Jacob Hartgen, administrator, within ten (10) days, answer in full the facts upon which is based his conclusion of the alleged gift.

LAZOS vs. MULL, et al., (No. 2.)

Contracts—Adoption—Husband and Wife.

A husband cannot bind his wife to the adoption of a third party, with all its legal consequences affecting her property, without her assent; and where a plaintiff in a bill in equity bases his right to a decree upon a contract by both husband and wife to adopt him, and proves only an engagement by the husband, the action necessarily fails.

In the Court of Common Pleas of Berks County. In Equity.

No. 1187 Equity Docket, 1917.

Exceptions to decision.

W. B. Bechtel and Rothermel & Mauger for plaintiff and exceptions.

Harry J. Dumn for defendants.

Opinion by Endlich, P. J., May 25, 1918.—To the decision in this case, reported in 10 Berks Co. L. J. 134, the plaintiff has filed a number of exceptions. None of the matters raised by them except one seems to call for any further discussion than is found in the decision excepted to. That one, if the position of the plaintiff is properly apprehended by the Court, is to the effect that John L. Mull, the husband of Sarah K. Mull, made a promise intended to be binding upon both to adopt the plaintiff in the event of his becoming a partner with them in the candy business, and that that contract bound the wife. It will be noted that she was the owner of the property involved in the transaction, whatever it was, and that the bill predicates the rights of the plaintiff upon a joint undertaking of the husband and the wife, which, so far as the wife is concerned, is negatived by the evidence and the findings of the decision. It can require no authorities to show that a husband cannot bind his wife to the adoption of a third party, with all its legal consequences affecting her property, without her assent, and that the undertaking of the husband alone being proved and her assent not being shown, the basis of the action necessarily falls. That is the case here, and that being the case, there seems to be nothing in the exceptions demanding a modification of the decision heretofore made.

And now, May 25, 1918, the exceptions are dismissed, and counsel may prepare and submit the proper final decree in accordance with the foregoing opinion and the decision heretofore filed, sec. reg.

MILLER vs. GERY.

Practice, C. P.—Changing Theory of Case on Argument for New Trial.

Where a case has been tried and submitted to the jury upon one theory, a verdict returned therein cannot be reviewed and disturbed on a different theory.

In the Court of Common Pleas of Berks County.

No. 92 May Term, 1917.

Rule for New Trial.

John B. Stevens for defendant and rule.

C. H. Ruhl for plaintiff.

Opinion by Endlich, P. J., May 25, 1918.—This is an action in which the plaintiff, an attorney-at-law, seeks to recover from the defendant a fee for professional services upon an oral contract between the parties averred in the declaration to have been

made in 1908, but on the trial of the case and under the evidence then produced, in 1912. The verdict was for the plaintiff, and the defendant is asking for a new trial mainly on the grounds of a variance between the allegations of the declaration and the proofs, and of the insufficiency of the evidence to sustain a verdict for plaintiff.

So far as the former position is concerned, it is to be noted that the cause was tried and submitted to the jury on the footing of the evidence relating to a contract in 1912, no exceptions being taken to the admission of such testimony or the submission of the case to the jury upon that theory. There are many decisions which hold that, a case having been tried and submitted upon one theory, a verdict returned therein cannot be reviewed and disturbed on a different theory,—a principle reaffirmed in the very recent opinion of the Supreme Court in the appeal in *Quinter vs. Quinter*, C. P. Berks Co., No. 48 June T. 1917, rendered on Apr. 22, 1918, and not yet reported. According to that principle it is too late now to insist upon this matter of variance as a reason for granting a new trial.

As regards the other objection referred to, it may be conceded that the testimony of the plaintiff was perhaps in certain particulars somewhat vague and indefinite. But such as it was, and in the light of the testimony for the defence, it commended itself to the jury, who were the judges of its credibility and effect: see *Maynes vs. Atwater*, 88 Pa. 496. It can hardly be said as a matter of law that the evidence as a whole was insufficient to justify the verdict or that its clear preponderance was contrary to the same. Under these circumstances it would be an abuse of discretion to set the verdict aside upon this ground.

It is also suggested that the charge of the Court erred in confining the whole inquiry in the case to the question as to whether or not the alleged contract of 1912 was made. The answer is that what was said on that subject was said in response to a request of defendant's counsel for instructions that any contract to be enforceable must have been made within six years. There was no objection to what was said by the Court. Moreover, as already indicated, that instruction was in the line of the theory on which the case was tried and which has already been adverted to. It follows that there is no adequate warrant here for ordering a new trial, and therefore—

The rule to show cause is discharged.

S. G. V. COMPANY vs. S. G. V. CO.**Contracts—Sale Conditional Upon Giving Satisfaction to Purchaser.**

At the audit of the account of the Receiver of S. Company, an insolvent manufacturer of motor cars, the V. Co. asked allowance of its claim for the cost of making a number of gear-shift devices alleged to have been contracted for by the company for installation on its cars. The preponderance of the evidence showed that the contract was conditional upon the device proving satisfactory on the cars, and that it had proven unsatisfactory. **Held:** that the auditor properly disallowed the claim.

In the Court of Common Pleas of Berks County,

No. 1134 Equity Docket, 1914.

Exceptions of Vulcan Motor Devices Co. to report of auditor.

Harvey F. Heinly for exceptant.

C. H. Ruhl for Receiver of S. G. V. Co.

Opinion by Wagner, J., June 10, 1918.—The Vulcan Motor Devices Company claims from the S. G. V. Company \$11,465.12, of which amount \$1,325.92 was admitted to be due. The remainder, \$10,139.20, was disallowed by the Auditor. The amount disallowed is claimed by the Devices Company on three different items:

1. 40 shifts at \$60 each; total, \$2,400.
2. 76 switches, \$16.25 each, \$1,235.
3. \$6,504.20 on account of material used and labor expended on 269 uncompleted shifts.

The Vulcan Motor Devices Company contends that it had a contract with the S. G. V. Company for the manufacture of 500 gear shifts at \$60 each, and 310 rotary switches at \$16.25 each. That 40 of these gear shifts were completed, offered to the S. G. V. Company and refused, and that on the balance, 269 uncompleted gear shifts, it had furnished material and labor to the extent of \$6,504.20. That 76 completed switches, being the balance of the 310, were refused by the S. G. V. Company.

Exceptant's claim is based upon an alleged verbal contract for 500 gear shifts and upon a contract by letter and confirmation thereof for 310 switches. The S. G. V. Company bases its defense on the ground:

First—That no contract existed between the two parties for any definite amount of either shifts or switches.

Second—That the S. G. V. Company was obligated to receive the shifts and switches only upon the condition that they proved satisfactory as an electric gear shift device on the automobiles that it was manufacturing.

Third—That the electric gear shift device was not satisfactory, so that eventually it was compelled to discontinue entirely its use.

The gear shift and switch were used in conjunction and together constituted the automobile electric gear shift device. The Auditor sustained the contentions of the S. G. V. Company and disallowed the claim. The only person who testified that the Vulcan Motor Devices Company had a contract for 500 gear shifts was Roger W. Griswold, the President of the Company. His testimony is that after an exhibition of this device at the Boston Show he received a verbal order from R. E. Graham, President of the S. G. V. Company, and a written order for 310 switch devices. He states this order for 500 shifts was several times repeated during the months of April and May, 1913. Graham, when questioned whether he had ever had a contract with the Device Company for these amounts, testified that he had estimated that they would use a total of 500, which estimate was based upon the output for a Model F car which the company expected to build during 1913. He, however, denies that he had a contract for this specified amount and says that he said to Griswold that if it would develop that the company could not use these devices they would not buy them, to which he (Griswold) assented. Also that everything that was done with regard to this device was done upon this statement and the assumption that the device would have to be satisfactory or the company would not be obliged to take it. That upon this basis orders were given as needed.

John C. Spears was called as a witness by counsel for claimant company. He testified he was formerly employed by the S. G. V. Company; that he was present at the interview between Mr. Griswold and Mr. Graham when the matter was talked over in April or May after the Show in Boston, which was the time the contract was made as alleged by Mr. Griswold. When asked, "Did Mr. Graham give an order for 500 gear shifts?" he answered, "He said we were going to use 500." And then when questioned, "What did Mr. Griswold say?" his answer was, "he (Griswold) wanted some kind of a contract, but we were going to make some changes and Mr. Graham would not sign a contract until the whole thing was satisfactory" (N. of T., p. 171). If this apparently disinterested witness is to be believed, then there was no contract as alleged by Mr. Griswold for the 500 gear shifts at this time. The correspondence between the two parties also indicates that though the Devices Company contended that there was a contract for the 500 gear shifts, in no letter produced did the S. G. V. Company confirm this. On the contrary, there seems to have been constantly some dispute as to what the terms of the contract were to be, and the specifications relating to the manner and materials of construction in this device. It will not be necessary for us to go into the testimony in detail upon the various questions arising upon this claim, because the Auditor has very carefully reviewed the testimony in his Report, has cited

that which is pertinent to the issues, and has very clearly analyzed the testimony as it bears upon the various contentions of the two parties.

Mr. Griswold contends that this verbal contract was an unconditional one. Mr. Graham testifies that this electric device was to be satisfactory. In this he is corroborated by Mr. Spears and by W. H. Hill, the Purchasing Agent. The preponderance of the evidence is clearly in favor of the Auditor's finding that the orders to the Vulcan Motor Devices Company were given upon condition that the device was to be satisfactory. It was most conclusively shown that this device did not prove satisfactory. The best evidence of this was that the company was obliged to cease entirely the use thereof on account of the complaints received from the S. G. V. Company's customers. The finding that the contract was upon the condition that the device was to be satisfactory, and the further finding that it did not meet this condition, is sufficient to defeat the claim.

We overrule and dismiss the exceptions. The Auditor's Report is confirmed in disallowing exceptant's claim.

In re WATSON HOCH, a Weak-Minded Person.

Guardian and Ward—Support by Third Party Without Consent of Guardian—Compensation—Trial by Jury.

Where a person gives board and lodging to a weak-minded person without contracting with his guardian, the Court, on petition for a decree for payment, will refer the case to a jury on the questions of quantum of compensation and of the imperative necessity existing to warrant claimant in providing support for the ward without the guardian's consent.

In the Court of Common Pleas of Berks County.

No. 102 November Term, 1916.

Rule for payment of support.

Randolph Stauffer for rule.

Charles H. Tyson for Commercial Trust Co., guardian.

Opinion by Endlich, P. J., June 22, 1918.—In September, 1916, Watson L. Hoch, a person noticeably deficient in intellect, came to live with Charles Keller, and has been there ever since, receiving his board, lodging and washing. He is a single man and about 50 years old. Originally possessed of an estate of approximately \$4,000, he fell to dissipating the same, reducing it to \$2,350, represented by mortgages, and these he assigned to Keller on the latter's agreement to support him, Keller being at the time a man of no means. On Jan. 16, 1917, in a proceeding in-

stituted by Hoch's father, a well-to-do person, Hoch was by this Court declared weak-minded, and the Commercial Trust Co. appointed to take care of his estate. The father promptly requested Hoch to return to him and live with him. About the same time the Trust Company, as Hoch's guardian, notified Keller that the father was ready to give Hoch a home and that no claim of Keller's for keeping Hoch would be recognized. On the Trust Company's request, Keller transferred to it the mortgages above referred to. But Hoch refused to take up his residence at his father's house, and Keller feared to anger him by insisting upon his leaving. A demand upon the Trust Company by Keller for payment being declined, an action was brought by him against the Trust Company before a magistrate to recover for Hoch's board, etc., from September, 1916, to June, 1917, in which judgment was given by the magistrate in favor of the plaintiff for \$284, but appealed by the Trust Company. It is now explained that Keller's intention is in that action to ask only for so much as covers the period intervening between September, 1916, and Jan. 16, 1917. With respect to the period beginning at the last-named date, Keller presented his petition to this Court praying it to direct the Trust Company to pay to him for Hoch's keep from that time on, i. e., for 46 weeks at the rate of \$7.00 per week, out of the principal of Hoch's estate the sum of \$322, whereupon this rule was entered. The Trust Company objects on the grounds (1) that the proceeding is not a competent one, but that Keller should have sued in *assumpsit*, and (2) that in any aspect the facts appearing by the record and depositions make out no case for the allowance asked.

Let it be granted that the Court has the power to make an allowance out of the principal of a weak-minded person's estate for his support, just as the proper Court has the power to make such an allowance out of an infant's or a lunatic's estate, and that that power extends to the making of an allowance for past support where there has been no previous authorization of it, on the doctrine that what a Court may sanction in advance it may ratify subsequently. Yet it is clear that the power invoked is a discretionary one: see *Guthrie's App.*, 16 Pa. 321, 324; *Parke's Case*, 41 Pa. Super. Ct. 531, 533, and as pointed out by Judge Woodward in *County Auditors' Report*, 1 Woodw. 270, at p. 272, the exercise of judicial discretion is always to be controlled by established and recognized principles. "The general proposition that the law implies an obligation on the part of a lunatic or his estate to reimburse those who have supplied his necessities, cannot be questioned." *Arnold's Est.*, 253 Pa. 517, 520; and see also *Mansley's Est.*, *ibid.* 522. But this proposition is to be read in connection with what is said with reference to matters falling within the same rule in *Bredin vs. Dwen*, 2 W. 95, 102: "To determine that a stranger may recover the price of goods fur-

nished to a ward against the injunctions of the guardian, would be to uproot the foundations of society. Nothing would justify such an interference but a case of extreme necessity, founded on a neglect of the guardian's duty, the proof of which, however, rests on the claimant of compensation,"—and in *Guthrie vs. Murphy*, 4 W. 80, 81: "It is * * * incumbent on those who mean to create an obligation binding on an infant, where he has a parent or guardian extending towards him his care and protection, to apply to such parent or guardian, and contract with him."

It follows from these authorities and others in the same line that a claim such as is made here under the circumstances above detailed can commend itself to the Court only upon clear proof of an imperative necessity, which is not satisfactorily apparent. It seems but fair, however, to the parties to hold that this feature of the case, instead of compelling a summary and unqualified refusal of the application, calls for the intervention of a jury, either by way of an issue to be framed under Keller's petition, or in an action of assumpsit to be brought by him against the Trust Company. It may be added that the quantum of compensation, if any is to be allowed, ought at the same time to be submitted to the judgment of the jury. Such being our conclusion,—

The rule to show cause is discharged, without prejudice to the right of the petitioner to proceed for an issue triable by jury or to bring an action of assumpsit for the recovery of his claim, in accordance with the foregoing opinion.

S. G. V. COMPANY vs. S. G. V. CO.

Corporations—Insolvency—Receiverships—Audit of Account of Receiver—Claim by Company Substantially Identical With Insolvent Corporation.

At the audit of the account of the Receiver of the S. G. V. Co., a Pennsylvania corporation created for the manufacture of motor cars, the S. G. V. Company, a Delaware corporation, presented a claim for \$146,000, being for moneys alleged to have been loaned the Pennsylvania corporation upon its notes. The evidence indicated that from the time of the formation of the Delaware corporation in 1911 until the appointment of the Receiver for the Pennsylvania corporation, the latter was at all times controlled and its affairs conducted by the former; that its property and assets held in its name were in fact purchased and owned by the Delaware corporation; and that the business of the manufacture and sale of automobiles at Reading was not even nominally conducted by the Pennsylvania corporation, but was in every particular managed, controlled and conducted by the board of directors of the Delaware corporation at its monthly meetings. The evidence also showed that the Delaware corporation was not registered in Pennsylvania. **Held:** that the master properly disallowed the claim.

The Delaware corporation "not only acquired the control and property of the Pennsylvania corporation, but it used and operated that corporation as an adjunct or instrumentality for the accomplishment

of its own purposes, creating a substantial identity between the two, which, in order to the administration of justice and equity and the avoidance of palpable injustice and inequity, must be deemed to render insignificant their artificial separate personalities. When the Delaware corporation put its money into the Pennsylvania corporation, it put it into its own enterprise, as owner of the Pennsylvania corporation and business, not into another's enterprise by way of loan as a creditor dealing with a debtor. What it chose to call these supplies of money is of no serious moment. The law pays little heed to the label parties put upon their transactions."

In the Court of Common Pleas of Berks County: In Equity.

No. 1134 Equity Docket, 1914.

Exceptions of S. G. V. Company to Master's Report.

Cyrus G. Derr for exceptions.

Snyder, Zieher & Snyder, contra.

Opinion by Endlich, P. J., July 1, 1918.—Before the Master appointed to distribute the fund in the hands of the Receiver of the S. G. V. Co., an insolvent Pennsylvania corporation created for the manufacture, etc., of automobiles, the S. G. V. Company, a Delaware corporation, presented a claim of upwards of \$146,000 for moneys alleged to have been loaned by it to the Pennsylvania corporation upon its notes, and to be owing by the Pennsylvania corporation to the Delaware corporation. If allowed, this claim would take the larger part of the fund and very greatly curtail the dividend coming to other claimants upon it whose status as creditors is not impugned. These creditors have objected to the admission of the Delaware corporation as a distributee upon two grounds. The first is in substance stated to be that from the time of the formation of the Delaware corporation in May, 1911, until the appointment of the Receiver for the Pennsylvania corporation in September, 1914, the Pennsylvania corporation was at all times so controlled and its affairs so conducted by the Delaware corporation as to make the former merely an instrumentality or adjunct of the latter; that the property and assets held in the name of the Pennsylvania corporation were in fact purchased and owned by the Delaware corporation; that the business of the manufacture and sale of automobiles at Reading, Pa., was not even nominally conducted by the Pennsylvania corporation, but was in every particular managed, controlled and conducted by the Board of Directors of the Delaware corporation at their monthly meetings held in New York; and that to allow the Delaware corporation to share in the proceeds of the assets now in court for distribution as against bona fide creditors of the business so conducted, managed and controlled by the claimant company itself would work a gross injustice and fraud upon such creditors. The second ground advanced is that the Delaware corporation, prior to the presentation of its claim

before the Master, was not registered in Pennsylvania under the Act 22 Apr. 1874, P. L. 108, and the subsequent Act 8 June 1911, P. L. 710, amended by the Act 22 Apr. 1915, P. L. 170; that nevertheless the Delaware corporation was from its inception doing business in Pennsylvania within the purview of these several Acts of Assembly; and that therefore its claim, arising from such transactions, could not be lawfully allowed. The learned Master reported against the claim on both grounds, and the Delaware corporation has filed these exceptions to his action.

(1) A searching study of the Master's report, of the evidence accompanying it and of the elaborate arguments of counsel on both sides, with the pertinent decisions, has satisfied us that the findings and conclusions of the Master on the first ground stated should be approved. It is well understood that the findings of a Master based, as here they largely are, upon reasoning and deductions from other facts reported by him do not have the same persuasive effect as findings made from direct testimony: Phillips's App., 68 Pa. 130, 138. But under the evidence accompanying the Master's report in this case it is not perceived how a conclusion can be reached on the material facts different from that which the Master has reached. A brief statement of these facts, about which there can be no real dispute, may aid a ready understanding of the case without unduly swelling a somewhat bulky record.

Early in 1911 the Acme Motor Car Co., a Pennsylvania corporation, was the owner of a plant at Reading and engaged in the manufacture of automobiles known as the "S. G. V." cars. Practically all of its capital stock was held by J. H. Sternbergh, to whom the corporation was also considerably indebted. In March, 1911, he entered into an agreement with three persons, giving them an option to acquire the Acme Company upon terms involving a liquidation by him of the indebtedness owing to him by the Acme Company by accepting a transfer and conveyance of all its tangible real and personal property and thereupon undertaking to satisfy all the other debts of the Acme Company,—the execution and delivery to the three parties of a lease of the plant and equipment of the Acme Company at a rental of \$20,000 a year,—the sale to the same parties of all materials on hand for the "S. G. V." cars at cost price (subsequently ascertained to be \$70,500),—and the transfer to the same parties of the certificates for the entire outstanding capital stock of the Acme Company; the option to be exercised by notice to J. H. Sternbergh and the deposit of \$25,000 in a designated bank to the joint order of the parties to the agreement, together with an additional sum sufficient to pay J. H. Sternbergh the amount due him for rental of the plant and for the materials as above stated, upon performance of his undertaking. The option was assignable by the parties mentioned "to a new company to be

organized or to somebody acting in behalf of or in the interests of such new company or to persons subscribing to the preferred stock thereof." Thereupon there was incorporated in Delaware the S. G. V. Company, the excepting corporation, for the declared main purpose of manufacturing, etc., automobiles, etc. The new company deposited \$25,000 in accordance with the agreement referred to. The Acme Company's stock and the assets towards the purchase of which the \$25,000 were to be applied were at the time owned by J. H. Sternbergh; but the bill of sale and the lease were made in the name of the Acme Company, the sums due under the agreement being paid to J. H. Sternbergh out of moneys furnished by the Delaware corporation, and he returning the materials, etc., to the Acme Company, leasing the plant to the same, and transferring the outstanding capital stock of the Acme Company to the Delaware corporation, to whom certificates therefor were issued. No action was taken by the Directors of the Acme Company authorizing the borrowing of money from the Delaware corporation. At their meeting of May 15, 1911, the President and Treasurer were authorized and directed to pay to J. H. Sternbergh \$20,000 as first year's rental of the plant and \$70,500 as the purchase price of materials, etc., but the source of the money does not seem to be indicated in the Acme Company's minutes. The Board of the Delaware corporation, at its meeting of May 3, 1911, had authorized its President and Treasurer to loan to the Acme Company "such amount of money not exceeding \$100,000 as shall in their opinion be necessary to enable said Company to acquire the stock of materials and parts for the manufacture of S. G. V. cars now owned by Mr. J. H. Sternbergh, and also to procure a lease * * * from the said J. H. Sternbergh * * * and to pay the first year's rental thereon." This authority, however, was subject to the limitation that "before making any such loan, the said President and Treasurer shall receive the entire capital stock of the Acme Motor Car Co. * * * and shall also have received an instrument * * * agreeing to indemnify this Company as such holder of the capital stock of the said Acme Company against any liabilities of the Acme Company existing at the date hereof, except only such contracts for materials and supplies as the President of this Company shall expressly accept for this Company." At the same meeting it was resolved that R. E. Graham and H. M. Sternbergh, (two of the parties to the option agreement), as part consideration of the transfer to them of 2,000 shares of the common stock of the Delaware corporation, were to enter into a contract with the Delaware corporation to give their entire time and services for the term of two years at a stated salary. Perhaps even at this point it may be said to be fairly apparent that the Delaware corporation was created for the purpose of engaging in the business of manufacturing

automobiles through the instrumentality of the Pennsylvania corporation, and with that view was to purchase and did purchase and became the actual and real owner of the capital stock of the Pennsylvania corporation and of the stock of materials, etc., formerly used by the Acme Company and the lease of the plant occupied by the same. But there is more to be considered, remembering that actions speak louder than words and are the safest index of intentions. From the start of the Delaware corporation's activity, the business at Reading was entirely and absolutely controlled, managed and directed by the Delaware corporation. The heads of the business dealt directly with the Board of Directors of that corporation at their monthly meetings, and received their orders from the same. The Directors of the Delaware corporation fixed the prices of the cars and the terms of the contracts. They determined when and in what amounts the Pennsylvania corporation was to be furnished with money. They received reports from the Pennsylvania corporation of its business and discussed them. They treated the business precisely as their own, passing upon every question of business policy, and undertaking and performing all the duties ordinarily devolving upon the Board of Directors of a corporation in relation to the business conducted by it in every detail. Contracts of employment in the Pennsylvania corporation were made with the Delaware corporation, though the employees were paid by the former. A dividend on the Delaware corporation's preferred stock (afterwards made to appear on the books as an interest charge) was paid by the Pennsylvania corporation with funds furnished by the Delaware corporation. The Pennsylvania corporation met annually for the election of officers and nothing else, and its Board of Directors held but a single meeting subsequent to May 15, 1911, namely, on July 27, 1911, when they convened under instructions from the Board of the Delaware corporation for the purpose of changing the name from "Acme Motor Car Co." to "The S. G. V. Co." The circumstance that a distinct set of books was kept in the name of the Pennsylvania corporation and the moneys supplied by the Delaware corporation in the business were entered upon such books as loans, that notes for the amounts were executed by the Pennsylvania to the Delaware corporation, and that the employees and operating heads of the business were paid by the Pennsylvania corporation out of funds set apart and devoted to the operation of the business and so entered upon the books, being a mere matter of bookkeeping, cannot alter the essential fact that it was the Delaware corporation which through its Board of Directors supervised and managed the business in its entirety and that it had no other business. In other words, it not only acquired the control and property of the Pennsylvania corporation, but it used and operated that corporation as an adjunct or instrumentality for the accomplishment of its own purposes, creating a substantial

identity between the two, which, in order to the administration of justice and equity and the avoidance of palpable injustice and inequity, must be deemed to render insignificant their artificial separate personalities. When the Delaware corporation put its money into the Pennsylvania corporation, it put it into its own enterprise, as owner of the Pennsylvania corporation and business, not into another's enterprise by way of loan as a creditor dealing with a debtor. What it chose to call these supplies of money is of no serious moment. The law pays little heed to the label parties put upon their transactions: *B. & B. Co. vs. Hoover*, 95 Pa. 508, 513. It may be worth nothing in this connection that the precise relation found by the Master and just described as existing between the Pennsylvania and the Delaware corporations seems to have been contemplated and foreshadowed in formulating the charter of the latter. In Art. IV of that instrument, relating to the powers of the corporation, there occurs the following paragraph:—

"If and to the extent permitted by the local laws of each state and foreign country where the property may be situated, * * * the Company may cause or allow the legal title, right, or interest in any property or business acquired, established or carried on by the Company to remain or be vested or registered in the name of or carried on by an individual or by any other company or companies, foreign or domestic, formed or to be formed either upon trust for or as agents or nominees of this Company or upon any other terms or conditions considered for the benefit of this Company, and may manage or take over and carry on the business of such individual or individuals or of such company or companies so formed or to be formed, either by acquiring the shares, stocks or other securities thereof, or otherwise, and may exercise all or any of the powers of holders of shares, stocks or securities thereof, and receive and distribute as profits the income, dividends and interest on such shares, stocks or other securities."

From the facts recited, the result arrived at by the Master follows under the decisions. The legal principles applicable, with the opposite authorities, are so fully and satisfactorily set forth by him that any attempt at further statement or discussion could only amount to repetition of what appears in his report.

(2) The first ground of objection to the Delaware corporation's participation in this fund being sustained, it is needless to pass upon the other. It may be that the establishment of the first objection logically involves that of the second also, at least in part, its effect, to such extent, to be determined in accordance with the very familiar rule that what one is forbidden by statute to do directly he cannot be permitted to do by indirection. But whether or not this be so, the matters above treated of are enough to bar the Delaware corporation from coming in upon this fund. The conclusion, which seems inevitable, is that—

The exceptions are dismissed and the Master's report upon the claim of the exceptant is approved.

The testatrix did not intend these children to inherit from James Baus, but to take the remainder directly from her as her devisees. When she used the words "or heirs" she had in mind—there being one grandchild—not his heirs, but the heirs of these three children. She intended the three children of James Baus to be the source of inheritable succession through devise of the remainder from her. Her intent is expressed by reading the clause: I give and bequeath all my lands, tenements, and hereditaments, * * * unto my husband James Baus, and whatever remains after his death I give and bequeath to his children or their heirs share and share alike. This case is in line with Guthrie's Appeal, *supra*, and vests only a life estate in James Baus.

Judgment is directed to be entered upon the case stated in favor of the plaintiff and against the defendant, for the sum of \$1,172, and costs of suit.

SCHNADER vs. LIEVER.

Receipt "in Full for All Claims"—Conclusiveness.

A receipt "for work and supplies in full up to date, for all claims," is not conclusive, and will not bar the recovery of another account owing at the time the receipt was given, where the evidence shows that the receipt did not express the true state of facts and was not intended or understood to include the other account. The case is for the jury on the evidence.

"A receipt is like any other parol admission of the party, and is open to explanation or correction; and he may show that it was made by mistake, or does not exhibit the real state of facts."

In the Court of Common Pleas of Berks County.

No. 56 September Term, 1917.

Rules for new trial and for judgment n. o. v.

John B. Stevens for defendant and rules.

Oliver M. Wolff for plaintiff.

Opinion by Wagner, J., July 17, 1918.—Plaintiff brought this action against the defendant to recover \$113.38 for labor done and material furnished by him from May 3, 1917, to June 6, 1917, in repairing defendant's automobile. The defense to the major part of this claim was that on May 12, 1917, a settlement of the amount due to date had been made by the parties, and that in accordance therewith defendant gave to plaintiff a check for \$85, "in full." At the same time a receipt was given by plaintiff which read "Received from H. Liever \$85 for work and supplies

in full up-to-date, for all claims." Plaintiff contended that the check for \$85 in full, and the receipt therefor, did not include the bill for which suit was brought, but was in settlement of an old bill which amounted to \$133.

Plaintiff testified that on the morning of May 12, defendant's son, Israel Liever, came to his garage for the purpose of getting the car. That he then informed Israel Liever that he could not get it until he had paid for the old bill, meaning a bill for \$133. That after some argument they came to an agreement to settle this bill for \$85. The son told him to go down to his father, the defendant, and get the check. That the son then called up his father by telephone and told him that Mr. Schnader was coming down for a check for \$85.

Norman Von Neida testified that on May 12 he was in the employ of the plaintiff, but that at the time of the trial he was in the flour and feed business. He seemed to be an entirely disinterested witness. He said that he heard the conversation between plaintiff and defendant's son, and that Mr. Schnader stated to the son that he would not allow the truck to go out until they had settled this old bill. That he heard the conversation over the telephone. That Mr. Schnader gave him (Von Neida) instructions not to allow the truck to go out until he (plaintiff) came back with the check for the old bill.

That a settlement for \$85 was made on the morning of May 12; that it was for less than the amount claimed by plaintiff; that it was made by the plaintiff at plaintiff's garage with Israel Liever, acting for his father, and that in accordance therewith plaintiff then went to defendant's place of business to receive a check for \$85, the amount agreed upon, are established facts. Plaintiff, his witness Norman Von Neida, and also Israel Liever so testify. They differ in that plaintiff and his witness testify that the settlement for \$85 was for an old bill amounting to \$113, while the son testified that it was in full for all claims to date.

If the plaintiff and his witness are believed, then the settlement did not include the bill for which this suit was brought. The fact that the check was written "in full" would relate, by reason of plaintiff's contention, to the old bill alone. The receipt, however, was written "for work and supplies in full up-to-date, for all claims," which covers the greater portion of the present bill in dispute. Plaintiff contended that the receipt did not express the true state of facts, and that it related only to that agreement made at his place of business with the son for his old bill. In *Shoemaker vs. Stiles*, 102 Pa. 549, we have (page 553): "A receipt is like any other parol admission of the party, and is open to explanation or correction; and he may show that it was made by mistake, or does not exhibit the real state of facts: *Rusell vs. Church*, 65 Pa. St. 9; *Wharton on Contracts*, § 938." In *Batdorf vs. Albert*, 59 Pa. 59, it is held: "There is a distinction as to oral

testimony, between solemn contracts *inter partes* in writing executed and delivered, and receipts, the acknowledgment of one party only." That is: "The rule as to the contradiction or modification of written agreements by parol evidence is not applicable to a receipt signed by one of the parties." Spittall vs. Allee, 55 Pa. Superior Ct. 636, 638. This is not the case of a receipt given in full upon settlement of account, where the only evidence in the case to overcome the receipt is that of the person who gave it. The evidence of the plaintiff was corroborated by that of his workman. Plaintiff's claim was denied by the defendant and his son, both manifestly interested witnesses.

The defendant has not excepted to and does not complain of the admission of any evidence or of the charge. He bases his whole reason for a new trial and judgment n. o. v. upon the ground that the verdict was against the weight of the evidence and the law. We consider that the case was one for the jury.

Rules for new trial and for judgment n. o. v. are discharged.

MANWILLER vs. MANWILLER, Adm'x. (No. 2).

Written Instruments—Mistake—Collateral Assignment Instead of Absolute Assignment.

Plaintiff sued defendant to recover the amount of a policy of insurance on the life of defendant's decedent, which he alleged had been assigned to him for value by decedent. The assignment on its face purported to be as collateral security for present and future indebtedness, but the testimony showed that an absolute assignment had been intended by the parties, but that by mistake the wrong printed form had been used, the error not being discovered until after decedent's death. **Held:** that the jury properly found for plaintiff.

Life Insurance Policies—Assignment for Value—Option to Repurchase—Death of Assured.

Where, in the liquidation of the assets of a bankrupt, a policy of insurance upon his life is sold at its then surrender value, and the purchaser promises to return the policy to the bankrupt upon reimbursement for its cost, but the former dies without having bought back the policy, his personal representative has no standing to claim the difference between its proceeds and the former sale price. The option to redeem contemplated a policy of an undetermined value, which it remained during the bankrupt's lifetime, not a policy of a determined value which it became after his death. The option, therefore, ended with his death and did not enure to his personal representative.

In the Court of Common Pleas of Berks County.

No. 60 August Term, 1916.

Rules for new trial and for judgment n. o. v.

E. H. Deysher for defendant and rules.

Snyder, Zieber & Snyder for plaintiff.

Opinion by Wagner, J., July 17, 1918.—The issue in this case was whether the plaintiff or the defendant, was entitled to the sum of \$1,704.14, the proceeds of policy No. 717,807, issued by the Northwestern Mutual Life Insurance Company.

Henry H. Manwiller had taken out this policy for \$2,000. Several years prior to his death he became a bankrupt. John B. Stevens was his counsel during the entire bankruptcy proceedings. H. Robert Mays was the Trustee in Bankruptcy, and Joseph R. Dickinson was attorney for the Trustee. In the settlement of the estate the policy was transferred to Daniel H. Manwiller, his brother. The transfer on its face purports to be an "Assignment of Policy as Collateral Security for Present and Future Indebtedness." The latter part of this assignment reads:

"The interest of the assignee in the policy hereby assigned shall include any and all indebtedness which I may now or at any time hereafter be owing to the said assignee and which may exist at the time of the settlement of the policy, the remainder of said policy, if any, being unaffected by this assignment."

If the assignment intended to be made was such as the assignment executed purported to be, the defendant was entitled to the money in dispute. Plaintiff contended that the assignment did not represent the agreement between Henry H. Manwiller and himself, and that a mistake had been made. That what was intended was not a collateral assignment as security for indebtedness, but an absolute assignment, and that the mistake had been made by the attorneys in not noticing when they filled out the blank form that it was a collateral assignment and not an absolute assignment.

The only evidence in this case that what was intended was an assignment for the present and future indebtedness of Henry H. Manwiller, was the instrument itself. Mr. Stevens testified that when the question of this policy came up in the settlement of the bankrupt estate of Henry H. Manwiller, that he, the bankrupt, declared that he did not desire to retain the policy. It was then suggested that his brother Daniel take it, whereupon it was agreed between Henry Manwiller and Daniel Manwiller, that Daniel buy the policy. That at the time this assignment was made, an assignment to Daniel, absolute in form, was also made of another policy. That when he filled out this second assignment he thought he was filling out an absolute assignment instead of a collateral one, and that the doing so was clearly a mistake and did not represent the intent of the parties. That the first time that he learned that a collateral assignment had been executed instead of an absolute one, was after the death of Henry H. Manwiller. That there was nothing said about a collateral assignment of the policies, but that what Henry Manwiller wanted was that his brother Daniel buy them. That he did not notice that this was an assignment collateral in form.

Mr. Dickinson testified that at a meeting of the creditors before the Referee he asked Henry Manwiller whether he wanted to exercise his right as bankrupt to buy back the policies by paying the value thereof. That Henry said no, he did not want them. That he then turned to Daniel Manwiller and said that he should buy the policies. That subsequently, after the value of the policy to the estate had been ascertained from the insurance company, and when they were together for the purpose of making the assignment, after they had agreed that this policy should be transferred to Daniel Manwiller, he asked Henry Manwiller whether he was satisfied that this should go over to his brother Daniel. That at the third and final meeting, when the assignment was made, he asked Henry Manwiller whether he understood now that he was giving up all his interest in this policy, and that he answered yes.

Mr. Mays, also a member of our Bar, testified that at this final meeting, when the assignment and transfer was made, that both Henry Manwiller and he stated and agreed that they would assign and transfer to Daniel Manwiller their interest in the policies. That when they were about ready to execute the papers, Mr. Dickinson asked Henry Manwiller, in the presence of the rest of those who were there, including Mr. Stevens, whether or not he knew (p. 20) "he was assigning all of his interest in these policies to Daniel Manwiller." That thereupon Henry Manwiller and he (Mays) stated and agreed that they would assign to Daniel Manwiller their interest in these policies. The question, as to whether a mistake was made, upon this evidence, was submitted to the jury, and it found in favor of plaintiff's contention, namely, that what was in fact intended to be done was the making of an absolute assignment. The evidence fully warranted this finding.

The only other question that arose at the trial was upon the testimony of Frances E. Manwiller, who testified that after the death of her husband, Henry Manwiller, she met Daniel Manwiller in Mr. Deysher's office. That Daniel Manwiller there stated that he (p. 26) "had agreed with Henry Manwiller to refund the policies * * * when he had paid me back the money I had advanced on the policies." That he (Daniel) said, "I agreed to give him back the policies when he paid me that money." There was no evidence whatever, and it is admitted, that during the lifetime of Henry Manwiller this agreement, or offer, or option, was exercised, or that at any time since it was attempted to be exercised by her as the personal representative of Henry H. Manwiller, deceased. Her contention was that Daniel had received sufficient from the policy that had been absolutely assigned to him to cover what he had paid for this policy, and that this was sufficient to entitle her to the proceeds of this policy. Even if the agreement was such as contended for by the

defendant, the thing in mind at the time of the agreement was a policy of an undetermined value, which it was during the lifetime of Henry Manwiller, and not the policy of a determined value, which it became upon his death. The thing, the policy, therefore, to which the agreement related, was not the thing that existed after the death of Henry Manwiller. The agreement or option to redeem the policy, not having been exercised during the lifetime of Henry Manwiller, upon his death consequently did not enure to his personal representative, and defendant was not entitled to recover upon this second ground.

Rules for new trial and for judgment n. o. v. are discharged.

BAUS, Trustee, vs. JOHNSON.

Wills—Construction—Life Estate or Fee—Rule in Shelly's Case.

Testator's will provided as follows: "I give and bequeath all my real and personal estate . . . unto my husband James Baus, his heirs, administrators and assigns to and for his absolute use and benefit during his lifetime; and whatsoever remains after his death to his children or heirs share and share alike." At the time of the making of the will the husband had three children and a grandchild. It was contended that under the Rule in Shelly's Case the husband took a fee simple estate. Held: that the testatrix's intention, as gathered from the will, was to use the word "children" in its ordinary sense, not as a word of limitation but of personal description; that she intended the children to take the remainder directly from her as her devisees, since she used the words, "or heirs," meaning not his heirs but the heirs of the children, there then being one grandchild; and that James Baus took only a life estate.

Wills—Construction—'Children' as Word of Purchase.

"All authorities agree that 'children' is prima facie a word of purchase, and that it cannot be construed otherwise unless the context plainly shows that the testator did not employ the word in its ordinary sense."

No. 111 April Term, 1918.

Case stated.

Silas R. Rothermel for plaintiff.

Walter B. Freed for defendant.

Opinion by Wagner, J., July 17, 1918.—The question to be determined is whether James Baus, under the will of his wife, Harriet Baus, had an estate for life or an estate in fee.

The facts, as they appear upon the case stated, are these: Harriet Baus, testatrix, was the second wife of James Baus. There were no children from this union. James Baus, at the time of the making of the will by Harriet Baus on February 23, 1899, by a former marriage, had three children: Horace Baus, Harvey Baus, and Matilda Brumbach. These were all living at the time of the execution of the will. Harriet Baus died August

27, 1908. Harvey Baus, one of the three children, died on March 30, 1899. He left one child, Helen, who was born previous to the time of the making of the will. Matilda Brumbach died on or about May 15, 1905, without leaving any children. At the date of the death of Harriet Baus the heirs were her husband, James Baus, his child Horace Baus, and his grandchild Helen. The will provides:

"2nd. I give and bequeath all my lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, money secured by life insurance, goods and chattels and all other parts of my real and personal estate and effects whatsoever and w eresoever unto my husband James Baus his heirs administrators and assigns to and for his absolute use and benefit during his lifetime; and whatsoever remains after his death to his children or heirs share and share alike."

It is contended by defendant that under the terms of this will James Baus had an estate in fee and not a life estate. The will provides that whatever remains after the death of James Baus is given and bequeathed to his children or heirs share and share alike. The fact that she gives to his children only what remains after his death does not vest in him an absolute estate in testatrix's realty: Follweiler's Appeal, 102 Pa. 581; Cox vs. Sims, 125 Pa. 522. This is conceded by defendant. Defendant contends that under the provision that after his death she gives and bequeaths what remains *to his children or heirs share and share alike*, children as here used is a word of limitation and not of purchase, and that therefore under the rule in Shelley's Case he took a fee and not a life estate.

Before we apply this rule, the intention of the testatrix must first be determined: Guthrie's Appeal, 37 Pa. 9, 13; Lauer vs. Hoffman, 241 Pa. 315, 318; Stout vs. Good, 245 Pa. 383, 387. What then was the intention of the testatrix when she used the words "after his death to his children or heirs share and share alike?" This must be determined in the light of the circumstances existing at the time of the making of the will. In Follweiler's Appeal, supra, we have (page 583): "In Postlethwaite's Appeal, 68 Pa. St. 477, it was said: 'It has been long and well settled, and indeed it is a principle so consonant to reason, that the only wonder is that it should ever have been questioned, that all the surrounding circumstances of a testator—his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction to the provisions of his will.' In view of the circumstances in which the testator made his will, as to his property, or his family, the meaning of his words may be plain where otherwise it would be uncertain." Bearing in mind the surrounding circumstances, that at the time the testatrix made her will James Baus had three children living, and that one of these children also had a child, it is clear that

she used the word "children" in its ordinary sense. That is, she used the word "children" not as a word of limitation, but of personal description. "Children, in their natural import, are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, when the words cannot take effect in any other way: "Guthrie's Appeal, supra, (page 14). Also in Stout vs. Good, supra, we have (page 386): "All authorities agree that 'children' is prima facie a word of purchase, and that it cannot be construed otherwise unless the context plainly shows that the testator did not employ the word in its ordinary sense (Affolter vs. May, 115 Pa. 54; Guthrie's App., 37 Pa. 9, 14."

The testatrix did not intend these children to inherit from James Baus, but to take the remainder directly from her as her devisees. When she used the words "or heirs" she had in mind—there being one grandchild—not his heirs, but the heirs of these three children. She intended the three children of James Baus to be the source of inheritable succession through devise of the remainder from her. Her intent is expressed by reading the clause: I give and bequeath all my lands, tenements, and hereditaments, * * * unto my husband James Baus, and whatever remains after his death I give and bequeath to his children or their heirs share and share alike. This case is in line with Guthrie's Appeal, supra, and vests only a life estate in James Baus.

Judgment is directed to be entered upon the case stated in favor of the plaintiff and against the defendant, for the sum of \$1,172, and costs of suit.

Di PIETRO vs. SAUL.

Written Instruments—Rescission by Agreement and Substitution of New Contract—Requisites of Proof.

Where plaintiff alleges the revocation by parole agreement of a written lease for a term of years and the substitution of a verbal lease from month to month, the testimony upon which he relies must be clear, precise and indubitable, and must be corroborated by another witness or by proof of confirmatory attending circumstances.

In the Court of Common Pleas of Berks County.

No. 92 December Term, 1917.

Rules for New Trial and for Judgment n. o. v.

Walter S. Young for defendant and rules.

Harry J. Dumn for plaintiff.

Opinion by Wagner, J., July 25, 1918.—The issue to be determined in this suit was:

"Did the parties, plaintiff and defendant, on or about February 28, 1917, mutually agree to rescind and nullify the written contract of lease entered into between the parties on February 19, 1916, and substitute in its place a verbal lease for the term from month to month?"

The lease of February 19, 1916, under seal, was for the term of three years beginning March 1, 1916. Plaintiff contended that this lease was rescinded, and in its place a verbal lease was substituted for the term of month to month. "This, of course, cast upon him the burden of establishing, by competent evidence, the making of such new lease and its terms: *Beale vs. House of Refuge*, 61 Pa. Superior Ct. 30, 34. The evidence relied upon by the plaintiff for this substitution consisted of his own testimony and that of the witness Santo Lucckese. Among the requisites necessary to change a written instrument, as stated in *Thompson vs. Schoch*, 254 Pa. 585, 589, 590, we have: "It is established with us that the testimony of a defendant, standing alone, is insufficient materially to modify the plain terms of a written instrument sued upon; that, before such testimony can be permitted to have this effect, it must be corroborated by other witnesses or proof of confirmatory attending circumstances. * * * * In other words, in order to sustain such defense, the evidence relied upon, taken as a whole, must be so persuasive in character, so free from self-contradiction or material internal variances, and so intrinsically probable, that the judicial mind can rest thereon with a conviction that the ends of justice would be served by giving it effect as the basis of a decree reforming the writing in suit. * * * * In brief, their testimony must be clear, precise and indubitable before it can be permitted to overcome the documentary proof to which it is opposed." See also *Crawford vs. Bellevue, etc., Gas Co.*, 183 Pa. 227, 231; *Hunter vs. Oil & Gas Co., Ltd.*, 204 Pa. 385, 388; *Fuller vs. Law*, 207 Pa. 101, 103; *Faux vs. Fitler*, 232 Pa. 33, 35; *Phila. & Del. County R. R. vs. Conway*, 177 Pa. 364, 367.

Plaintiff testified that on February 28, defendant came to him and told him that the Court had refused a liquor license for the building. That he said, "Now, if you want to stay in my place, you stay until you want to stay." Thereupon plaintiff said, "All right, I will stay, but month to month." To which defendant replied, "All right, if you want to stay, stay. If you want to get out, get out (N. of T., p. 4)." Plaintiff remained on the leased premises until August following this conversation. Defendant's answer cannot be construed as an assent to nullify the written agreement and substitute a new lease therefor. The most that can be said for it is that the defendant gave the plaintiff an option to then (February 28) get out of the building. Defendant denied that he had this conversation with plaintiff. The only corroborative evidence was that of Santo Lucckese,

an Italian, who understood English very imperfectly, and who testified that he was not able to speak it. He testified that all that he heard was that defendant said, "If you want to stay here, you can stay." To which plaintiff replied, "All right, I will stay here, I will stay here month by month (p. 6)." This is not sufficient corroborative evidence of an agreement that the written lease be annulled and that a new verbal one be substituted therefor. Plaintiff's evidence was not such as would justify a chancellor to annul a written instrument, and defendant's point for binding instructions should have been affirmed: *Ogden vs. Traction Co.*, 202 Pa. 480, 487; *Highlands vs. Railroad Co.*, 209 Pa. 286, 292; *Thompson vs. Schoch*, *supra*, at page 590.

Rule for new trial discharged: Rule for judgment n. o. v. made absolute.

BARGER et al. vs. STELWAGON MFG. CO.

Negligence—Automobile Collision—Contributory Negligence of Driver as Attributable to Passenger.

In a suit for damages for personal injuries resulting from a collision between an automobile and a motorcycle, the contributory negligence of the driver of the motorcycle is not to be imputed to a passenger, even though she is the wife of the driver, where the evidence fails to show that she joined in testing a manifest danger.

In the Court of Common Pleas of Berks County.

No. 38 February Term, 1918.

Rule for Judgment n. o. v.

E. H. Deysher for defendant and rule.

Chas. H. Tyson and John B. Stevens for plaintiffs.

Opinion by Wagner, J., July 25, 1918.—The plaintiffs, Samuel G. Barger, and his wife, Margaret E. Barger, brought suit against the defendant for damages which they claimed they had sustained on account of injuries that they received by defendant's automobile running into Mr. Barger's motorcycle. This collision they allege was caused by the negligent running of defendant's automobile. The accident happened at the intersection of Spring and Ninth Streets, two very frequented streets of the City of Reading, and, by reason of the great travel thereon, a very dangerous place. The negligence alleged was the excessive rate of speed at which defendant ran its automobile; the failure to slacken speed as the operator approached the crossing, and the failure to sound the horn.

There was ample evidence to warrant the jury in finding that the defendant was guilty of every one of these three alleged acts of negligence. The jury returned a verdict in favor of the defendant so far as the damages of Samuel G. Barger were concerned, and a verdict in favor of Margaret E. Barger for \$375. The verdict was evidently brought upon the finding that the defendant was negligent, and that Samuel G. Barger was guilty of contributory negligence. There was no admitted fact or any evidence in this case which would have warranted the Court in declaring as a matter of law that Samuel G. Barger was guilty of contributory negligence. Instead, the evidence on the contributory negligence of Samuel G. Barger was very meager. The defendant in its motion for judgment n. o. v. asks us to declare as a matter of law that Mrs. Barger was guilty of contributory negligence. The fact that the jury found against the husband does not bind the wife. The husband's negligence could not be imputed to her: *Senft vs. Western Maryland Ry. Co.*, 246 Pa. 446; *Wanner vs. Phila. & Reading Railway Co.* Pa. (not yet reported). There was no evidence of a danger so manifest to Mrs. Barger, the passenger, that would convict her of contributory negligence.

Rule for judgment n. o. v. discharged.

In re WEBER, Bankrupt.

Bankruptcy—Reclamation of Goods—Contracts—Delivery.

H. entered into a contract with W. to purchase a quantity of hosiery to be manufactured, and paid therefor in advance. A portion of the order was completed by W., each pair being stamped with H.'s special style number, banded, boxed and packed in crates with H.'s style number and crate number thereon, which were then set aside in the basement of W.'s mill subject to H.'s orders. An invoice covering the crates was sent to H. After shipping instructions had been received, but before actual shipment, W. was adjudicated a bankrupt. H. filed a reclamation petition, claiming the hosiery as his property. **Held:** allowing the petition that title to the hosiery had passed to H., and that W., after setting apart the goods for H., acted thereafter merely as his bailee.

In the United States District Court; Eastern District of Pennsylvania.

Petition of J. B. Hirshfeld & Co. for reclamation of hosiery.

Edward Endelman for petitioner.

T. I. Snyder and Randolph Stauffer for trustee.

Opinion by Bertolet, Referee, July 12, 1918.—From the evidence I find the following facts:

On August 21, 1917, J. B. Hirshfeld & Company gave Weber & Company an order for 4000 dozen men's hosiery to be manufactured for delivery by November 1st. The value of the goods, \$5000.00, was paid in advance. Orders of this character had been received from Hirshfeld & Company frequently since early in 1917 and the course in handling them was as follows: When made, the stockings were each stamped with Hirshfeld & Company's private style number by means of a stamp provided by Hirshfeld & Company for the purpose, were banded with a band bearing Hirshfeld & Company's private style number, boxed, packed in crates, with Hirshfeld & Company's name, or "J. B. H.," and a case number on each crate for purposes of identification, and then held in Weber & Company's mill subject to Hirshfeld & Company's orders, or as the bankrupt says and which amounts to substantially the same thing, to await "shipping instructions" from Hirshfeld & Company. Upon the receipt of such instructions, Weber & Company would in preparation to shipping the goods, first mark the name and address of the person to whom they were to be sent, (who in most instances was some third party to whom Hirshfeld & Company had sold the goods) upon the crates. They would then be carted to the railroad, where Weber & Company would obtain bills of lading in which Hirshfeld & Company was named as shipper, sending a copy thereof to Hirshfeld & Company. After crating and setting aside the goods Weber & Company would send an invoice to Hirshfeld & Company showing the case numbers, quantity of goods in each case and style number of the goods set aside, and the account of Hirshfeld & Company which had been credited with the advance cash payments would be charged with the goods.

With reference to this particular order for 4000 dozen, 960 dozen were finished about November 23, 1917, the stockings having been stamped about a week earlier with Hirshfeld & Company's special style number, "7-60." They were banded, boxed, put in 12 crates with Hirshfeld & Company's style number "7-60," and a crate number similar to a number kept in Weber & Company's books, on each crate for purposes of identification, were placed apart in the basement of the mill, subject to Hirshfeld & Company's orders, and an invoice dated November 27 covering the crates was sent to Hirshfeld & Company. At or before the time the goods were furnished, Weber & Company had received shipping instructions from Hirshfeld & Company for all the 12 crates. They would have been shipped out of the factory to various consignees, had it not been for extraordinary railroad conditions caused by the war which had brought about the placing of freight embargoes by the railways upon many kinds

of goods, thus making it impossible to send such goods by means of these carriers except at such times as notice was given Weber & Company of the temporary lifting of an embargo to a given point, when the latter would seize the opportunity, address and send out a case or cases to the consignees to whose shipping point the embargo may have been lifted, thus gradually getting the goods out of his mill. In this way 5 of the 12 crates were sent away between December 18, 1917, and February 14, 1918, leaving 7 crates containing 560 dozen hosiery and worth upwards of \$1000.00 in the basement of the Weber mill at the date of the adjudication in bankruptcy, marked and packed as above described.

Hirshfeld & Company have presented their petition to reclaim these goods as their property, and this is objected to by the trustee on the ground that no such delivery was made as gives Hirshfeld & Company property in the goods. On this point counsel for the trustee argues that the evidence shows delivery by Weber & Company to the railroad to have been a specified part of the contract and that until such delivery was made, no title passed to the trustee.

The contract between the parties having been made after January 1, 1916, the Pennsylvania Sales Act of May 19, 1915, P. L. 543 applies. Section 19 of that act provides,

"Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: x x x

"Rule 4. First. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

"Sec. 43. First. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not, his residence; x x x."

While these statutory provisions are in the main, declaratory of the law as previously existing, they afford plain and succinct guides for the determination of the issue before us, and taken in connection with the many authorities on the subject, there is no real difficulty, the law having been so briefly codified, in applying it to the facts of this case.

Thus there is no doubt that Weber & Company after finishing the hosiery by their acts unconditionally appropriated the goods to the contract; that they notified the buyer of such appropriation by sending the latter an invoice; that such appropriation was assented to by the buyer when directions where the goods were to be shipped, were forwarded; and that, in the absence of such terms of the contract contemplated by Rule 5, the property in the goods thereupon passed to Hirshfeld & Company.

But the learned counsel for the trustee argues that there were terms in the contract requiring Weber & Company to deliver the goods to a particular place, viz. to the railroad station; and that therefore, under Rule 5, no property therein passed to Hirshfeld & Company until that had been done, no matter what acts of appropriation had been performed by Weber & Company prior thereto.

To this contention I cannot, however, agree. I can find no evidence which clearly and unequivocally shows that such delivery was a specified requirement of the contract and that until made no property passed.

On the contrary the part played by the parties to the transaction contradicts the suggestion. After the goods were marked and set apart, Hirshfeld & Company assumed absolute dominion over them. They were subject to their orders, and in execution of such orders, Weber & Company were no longer acting as owner and seller, but as bailee for Hirshfeld & Company, and the latter were solely responsible for their future disposition. If shipping orders had never come the goods would none the less have been the property of Hirshfeld & Company. I cannot construe the fact that "shipping instructions" were to be sent to and performed by Weber & Company, to mean that this required "the seller to deliver the goods to the buyer, or at a particular place, etc." quoting the language of Rule 5, *supra*, in the face of the unconditional appropriation of the hosiery by Weber & Company to Hirshfeld & Company's contract, coupled with the other acts of the parties pursuant to their course of dealing, and especially in view of the fact that when shipped away the bill of lading always named Hirshfeld & Company as consignor. This seems to me very persuasive evidence that in what Weber & Company did after setting apart the goods to Hirshfeld & Company, they were acting in the

capacity of the latter's bailee, or agent.

Under all the facts I cannot but come to the conclusion that the petition to reclaim must be allowed, and an order entered directing the trustee, within 10 days of notice hereof, to turn over the goods claimed to the petitioner.

In re WEBER, Bankrupt, (No. 2).

In the United States District Court; Eastern District of Pennsylvania.

Petition of W. H. Fairall for reclamation of hosiery.

Harry F. Kantner for petitioner.

T. I. Snyder and Randolph Stauffer for trustee.

Opinion by Bertolet, Referee, July 12, 1918.—From the evidence I find the following facts:

On or about December 11, 1917, Fairall bought from Weber & Company 2400 dozen hosiery to be manufactured, paying the full price, \$3000.00, in advance. Owing to freight embargoes, the goods could not be delivered by railway, and Weber & Company's instructions were to assort the goods, pack them, mark them with claimant's name or initials, and hold them for further orders. These orders came in a few days and were to the effect that when packed and marked, the cases should be sent to the Columbian Warehouse at Reading. Thereafter Weber & Company delivered 800 dozen to the warehouse on January 31, 1918, and 300 dozen on February 11. As to the balance, 1000 dozen were on February 17 finished, assorted, packed, and marked with the name of W. H. Fairall on the crates, and set aside preparatory to their being sent to the warehouse. This would have been done the next day, but on February 18, the sheriff made a levy on all the personal property in the mill, thus preventing any further disposition of the goods. Bankruptcy followed the levy, and Fairall now presents his petition for an order directing the trustee to turn over the goods to him.

I have this day filed a memorandum of my views and entered an order in a property claim brought by J. B. Hirshfeld & Company in which I have come to the conclusion that property in the goods passed to Hirshfeld & Company, and have ordered the trustee to deliver them to the petitioner. While I regard the facts in the Hirshfeld & Company case much stronger in favor of the petitioner than in this, I am nevertheless of the opinion

that the views expressed in that case should prevail here, that property in the hosiery passed to Fairall when the goods were packed, marked, and set aside, and that under all the circumstances an order should be entered directing the trustee within 10 days of notice hereof, to deliver to the petitioner the property claimed.

FRITCH vs. SCHAEFFER.

Plaintiff and defendant had entered into an agreement to collaborate in perfecting a self-starting device for automobiles, the plaintiff engaging to furnish certain ideas he had evolved, to provide a car for experiments and to pay the filing fees and expenses for obtaining a patent; the defendant agreeing to do the mechanical work to perfect the device, to make application for a patent and then to assign to plaintiff a half interest therein. Plaintiff complied with his part of the contract, but defendant, after applying for a patent, refused to assign the half interest to plaintiff and attempted to sell the patent rights to a third party. **Held:** that an injunction should issue directing defendant to assign a one-half interest in the patent to plaintiff.

In the Court of Common Pleas of Berks County: In Equity.

No. 1158 Equity Docket, 1915.

Bill for Injunction.

D. N. Schaeffer & Son for plaintiff.

Walter S. Young for defendant.

Opinion by Wagner, J., July 30, 1918.—

FINDINGS OF FACT.

1. The plaintiff entered into an agreement with the defendant, Martin R. Schaeffer, that defendant complete a working model for an automobile self-starter, the terms of which agreement were:

(a) Plaintiff was to give to the defendant such ideas with reference to said model that he had obtained through his experience as an agent in selling and operating a certain automobile starter, of which the one to be worked out was to be an improvement thereof.

(b) Plaintiff was to furnish to defendant his Ford Automobile car upon which to experiment with this automobile starter to be worked out.

(c) Plaintiff was to pay to the defendant the filing fees to obtain a patent for the invention in the United States Patent Office.

(d) Plaintiff was to pay to the defendant his traveling expenses to Washington, D. C., incurred in making application for patent.

(e) Defendant was to do the actual mechanical work upon the self-starter.

(f) Defendant was to make application for and take out the patent in his own name.

(g) Defendant was then to transfer or assign to the plaintiff a one-half interest in said patent.

2. Plaintiff has complied with the terms of this contract as set forth in a, b, c and d of the first finding of fact.

3. On July 13, 1915, defendant made application in his own name to the Commissioner of Patents, at the Patent Office of the United States, for the exclusive right to manufacture and sell automobile starting apparatus, said application being marked Series 1915, No. 39,651.

4. Defendant refuses to assign to plaintiff the one-half interest in aforesaid application for patent.

5. Defendant has offered for sale and has attempted to sell the rights to said automobile starting apparatus and the application for said patent, to a third party.

DISCUSSION.

The only dispute in this case is as to the exact terms upon which the defendant was to assign to the plaintiff a one-half interest in the patent applied for. It is admitted that the application for the patent was to be in the name of the defendant and that defendant was then to assign a one-half interest. It is further admitted that the plaintiff was to pay for the filing fees and the expenses to Washington, and that he has done so. Plaintiff's testimony is that he furnished his car to the extent that was necessary. Henry Focht, defendant's witness, testified that he saw Mr. Fritch bring his car to the place where defendant was working on the self-starter; that he knew they were working on it, and that the car was left there to experiment with. Defendant's contention is that at times when the car was needed for experimental purposes it was not furnished by plaintiff. The

other matter of dispute relates to materials. It is admitted that the plaintiff did furnish some of the material. He, however, testified that in the agreement to perfect this self-starting device, nothing was said with regard to furnishing material as claimed by the defendant. In these two matters we find in favor of plaintiff's contention.

CONCLUSIONS OF LAW.

1. Plaintiff is entitled to a decree to perpetually restrain the defendant from making an assignment, sale or transfer of plaintiff's one-half interest in and to said patent or invention to any person other than the plaintiff.

2. The defendant be ordered and directed to execute to plaintiff an assignment and transfer of the one-half interest in said patent.

3. The costs of this proceeding shall be paid by the defendant.

AND NOW, July 30, 1918, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

In re FIES, Bankrupt.**Landlord and Tenant—Bankruptcy of Tenant—Surrender of Premises by Trustee—Rent Claim.**

S., the owner of premises occupied by the bankrupt, presented a claim for \$75 against the estate for rent for 3 months to February 1, 1918, at which time he had accepted a surrender of the premises from the trustee. The trustee defended on the ground that S. had issued a distress warrant against the bankrupt's exempt property and had recovered \$100. and had therefore been paid. S. contended that under the terms of the lease the rent for the remainder of the term to April 1, 1920, became due and payable by the bankruptcy, and that the distress had been based on that claim. **Held:** disallowing the claim, that when the landlord accepted a surrender of the premises he terminated the lease and the money realized on the distress must be applied to the rent due at that time.

Bankruptcy—Landlord's Claim for Unexpired Term of Lease—Acceptance of Surrender.

It is true that under the law of Pennsylvania a provision in a lease that the whole rent for the unexpired term should, in case of bankruptcy, at once become due and payable, may be enforced to the extent of giving the landlord priority for one year's rent, but such right is limited to cases where the landlord refuses the trustee's offer to surrender the premises and has never taken possession.

In the District Court of the United States; Eastern District of Pennsylvania.

Claim of Ammon Y. Schmeck for rent.

Cyrus G. Derr for claimant.

Robert G. Bushong for trustee.

Opinion by Bertolet, Referee, August 28, 1918.—The claim of Ammon Y. Schmeck, owner of premises occupied by the bankrupt, for rent from Nov. 1, 1917, to Feb. 1, 1918, (when the landlord accepted a surrender of the premises from the trustee), at \$25.00 per month, or \$75.00, has been presented. It appears that on Feb. 7, 1918, after accepting a surrender from the trustee, the landlord made a distress upon property of the bankrupt set apart to him as exempt and remaining upon the premises, for the collection of rent due. The distress was, however, released by payment to the landlord of \$100.00 and costs. This was more than the rent due and owing by the trustee for occupation of the premises prior to the surrender. The landlord claims to be entitled nevertheless to have distributed to him the amount of his claim as an expense of administration, on the ground that the distress was made for the rent for the entire term of the lease, to April 1, 1920, \$725.00, which under the terms of the lease had by the lessee's bankruptcy fallen due, and that the \$100.00 accepted when the distress was released, was in settlement only of the bankrupt's liability for the rent due for the unexpired term, excluding such amounts as might be due from the estate in payment of the trustee's use and occupation. It is true that under the law of Pennsylvania the provision in the present lease that the whole rent for the unexpired term should, in case of bankruptcy, at once become due and payable, may be enforced to the extent

of giving the landlord priority for one year's rent (In *Re Keith-Gara Co.*, D. C. Pa., 29 A. B. R. 466; 203 Fed. 585; affirmed by C. C. A. 3d Cir. 32 A. B. R. 435; 213 Fed. 450), but it must be noted that such right is limited to cases where the landlord refuses the trustee's offer to surrender the premises and has never retaken possession. Thus in *Re Winfield Mfg. Co.* 15 A. B. R. 24 (D. C. Pa.) the court said, "The present claimant accepted a surrender of the premises on May 10th and has since that date been in exclusive possession. He has been paid in full all the rent that was due when the petition in bankruptcy was filed x x. By accepting the surrender he assented to the position that the lease had been brought to an end by the proceedings in bankruptcy, x x." (See also *Wilson vs. Trust Co.* 8 A. B. R. 169, 114 Fed. 743; *South Side Trust Co. vs. Watson*, 29 A. B. R. 446, 200 Fed. 50).

I am of the opinion that when the landlord here accepted surrender of the premises he terminated the lease and any money realized by him on his distress must be applied to the rent due to that time. This sum is in excess of any claim he may have had against the estate, and having been paid in full, my conclusion is the claim should be denied.

LANDIS' ESTATE.

Wills—Stipulation as to Executor's Compensation—Additional Compensation—Exceptional Services.

The general rule that where an executor accepts the office with knowledge of a provision in the will fixing his compensation, he is ordinarily bound thereby, is not controlling where it appears that at the time of the acceptance of the trust the estate appeared solvent and easy of settlement, but that upon the death of the co-executor unexpected difficulties arose resulting in litigation in New York State, which, solely by reason of accountant's efforts, greatly benefited the estate. Such a case presents an exception to the general rule and additional compensation should be allowed.

Decedents' Estates—Counsel Fees.

Where counsel for the accountant conducted extensive litigation in another state involving the establishment of the estate's claim against a deceased debtor's estate and the sale of various pieces of real estate to enforce the judgments recovered, resulting in the estate receiving a fund of \$25,000, a counsel fee of \$1,800 for the litigation is reasonable and will be allowed.

In the Orphans' Court of Berks County.

D. N. Schaeffer & Son for Ida M. Martin, a legatee.

Cyrus G. Derr and B. Y. Shearer for accountant.

Opinion by Schaeffer, P. J., September 21, 1918.—The decedent died testate and married. on the 27th day of March, 1915, leaving to survive him a widow, Malinda Landis, and issue. By his last will and testament, he gave the residue of his estate to his said widow for her lifetime or widowhood, "she to have and receive all the rents, issues and profits of said estate during said time."

The account, which is the second, contains principal personal assets, and income, both real and personal. Of principal, the balance for distribution is shown to be \$17,797.73; and of income, \$740.88, personal, and \$26.12, real.

Accountant submits to be surcharged in the principal fund, \$1,623.58, balance of cash recovered in certain legal proceedings, in New York State, against the estate of D. B. Martin, deceased. D. B. Martin, at decedent's death, either directly or through notes on which decedent had been surety, was found to be indebted to this estate for something over \$23,000.00. Shortly after, the debtor died, and the executrix here proceeded to collect for this estate. She discovered property of D. B. Martin, at Riverhead, Long Island, and secured judgments against it by the proceedings referred to. On these judgments certain properties were sold. Of two, part of the proceeds are accounted for in a supplementary statement filed at the audit, and showing a balance of \$1,623.58, which is the subject of the surcharge already mentioned. Accountant also received as part of the purchase price of one of the properties a mortgage of \$7,000.00. Being a personal asset of this estate in her hands, she will be surcharged with this mortgage also. The name of the mortgagor does not appear, but for the purposes of this adjudication it will be known as the Riverhead property mortgage, and will be impounded in her hands for future accounting.

At the audit, Ida M. Martin, a daughter and legatee, objected to several credits for counsel fees and accountant's compensation. The supplementary account of moneys recovered by proceedings against the Riverhead property of D. B. Martin, deceased, in New York, shows that counsel there took credit for \$1,800.00 for services, and this credit is objected to. No testimony was offered to sustain the credit; nor was any offered against it. Local counsel for the estate, however, briefly set out the extent of the services performed, and the results achieved, and his statement, which appears in the notes, is part of the record. For present purposes, it is probably sufficient to say that the services appear to have been, not only considerable, but valuable. At any rate, the result has been the addition of something like \$25,000.00 to the assets of this estate; and having that particularly in mind, the Court, without anything more against the charge, is of the opinion that it should be sustained.

The other credit objected to is for \$1,118.56, accountant's compensation, on the ground that it exceeds the amount specifically fixed in the will. By the sixth item of the will, the compensation of the executors is fixed at \$500.00.

There seems to be no doubt about the general rule: "Where an executor accepts the office with knowledge of a provision in the will fixing his compensation, he is ordinarily bound thereby:" Hay's Appeal, 83 Pa. 296; Lennig's Estate, 53 Sup. Ct., 596. This settles the question with respect to all ordinary cases; and

the decisions show that in all such cases the rule has been strictly enforced. At the same time, it does seem to imply an exception. Ordinary cases only are specified by the rule. Nothing, however, is said about extraordinary cases; and that these should be treated as exceptions was undoubtedly in the Court's mind in deciding Hay's Appeal, *supra*. For while the point did not arise there, the Court clearly implied the existence of cases, open to discussion, "of an exceptional character, such as insolvency of the estate, or the presence of extraordinary circumstances."

It is on this exception to the rule that the accountant bases her claim for compensation above what the will allows. She is the widow of the decedent; and when she accepted the executorship under the will, there can be no doubt that it gave her no inkling of the true state of her husband's affairs. When he wrote the will, and fixed the compensation, he evidently regarded himself the possessor of an adequate estate. When he died, the widow found herself appointed co-executor with decedent's son-in-law, D. B. Martin, and the settlement of the estate apparently presented no difficulties. Subsequently her co-executor died; and then a very different state of affairs developed. The assets were not large; and what there were turned out exceedingly difficult of conversion. Moreover, large claims, growing out of decedent's endorsement of his deceased son-in-law and the accountant's co-executor, were presented against the estate; and in order to protect her husband's estate and to meet the new demands made upon it, accountant soon became involved in litigation in New York State, to marshal funds. When, consequently, the duties of administration had fallen entirely upon her, the estate, under the new developments, certainly did not appear to be solvent, and if it has since become so—which by no means is certain—it is due solely to accountant's efforts.

While, therefore, the Court is reluctant to deviate from the direction of the will with respect to her compensation, it feels that her claim for extraordinary services is reasonable. After her co-executor died, and the administration fell entirely upon her, we think a situation developed that took it out of the class of ordinary cases. It would thus seem to constitute an exception to the general rule; and in this connection it may be well to quote from *Guien's Estate*, 1 Ash, 317: "It is a bad rule that will not work both ways, and if the insolvency of the estate would defeat a liberal allowance for care and trouble given by the testator to the executor, it must leave the executor free to claim a sum beyond that fixed by the will, where the justice of the case demands that he should have it." Under these circumstances, the credits for accountant's compensation are allowed.

END OF VOLUME X.

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1. City Ordinances—Traffic Rules—Automobile Act 7 July, 1913,
P. L. 672—Conflict.

A city traffic ordinance requiring all vehicles to keep to the right of the centre of the street in the direction in which they are going and directing how turns into crossing streets shall be made, is not in conflict with the Automobile Act of 7 July, 1913, P. L. 672, which provides that "no city . . . shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act." **BELL vs. JACOBS, 149.**

BANKRUPTCY.

1. Landlord and Tenant—Surrender of Premises by Trustee—Rent Claim.

S, the owner of premises occupied by the bankrupt, presented a claim for \$75 against the estate for rent for 3 months to February 1, 1918, at which time he had accepted a surrender of the premises from the trustee. The trustee defended on the ground that S had issued a distress warrant against the bankrupt's exempt property and had recovered \$100, and had therefore been paid. S contended that under the terms of the lease the rent for the remainder of the term to April 1, 1920, became due and payable by the bankruptcy, and that the distress had been based on that claim. **Held:** disallowing the claim, that when the landlord accepted a surrender of the premises he terminated the lease and the money realized on the distress must be applied to the rent due at that time. **IN RE FIES, BANKRUPT, 241.**

2. Landlord's Claim for Unexpired Term of Lease—Acceptance of Surrender.

It is true that under the law of Pennsylvania a provision in a lease that the whole rent for the unexpired term should, in case of bankruptcy, at once become due and payable, may be enforced to the extent of giving the landlord priority for one year's rent, but such right is limited to cases where the landlord refuses the trustee's offer to surrender the premises and has never taken possession. **IN RE FIES, BANKRUPT, 241.**

3. Reclamation of Goods—Contracts—Delivery.

H entered into a contract with W to purchase a quantity of hosiery to be manufactured, and paid therefor in advance. A portion of the order was completed by W, each pair being stamped with H's special style number, banded, boxed and packed in crates with H's style number and crate number thereon, which were then set aside in the basement of W's mill subject to H's orders. An invoice covering the crates was sent to H. After shipping instructions had been received, but before actual shipment, W was adjudicated a bankrupt. H filed a reclamation petition, claiming the hosiery as his property. **Held:** allowing the petition; that title to the hosiery had passed to H, and that W, after setting apart the goods for H, acted thereafter merely as his bailee. *IN RE WEBER, BANKRUPT*, (No. 1), 233.

BILLS AND NOTES.

1. Negotiable Instruments—Accommodation Maker—Liability to holder in Due Course.

Where the holder of a promissory note for value sues the maker thereof, evidence of an agreement between the maker and payee that the latter should alone be responsible, is insufficient to prevent judgment, the plaintiff having no knowledge of the agreement. *BRENDLE vs. SCHMEHL*, 105.

2. Promissory Note Made to Executrix Individually—Pleading. *BEAM, EX'X, vs. RICHARD*, 62.

CITY ORDINANCES.

1. Traffic Rules—Automobile Act—Conflict. *BELL vs. JACOBS*, 149.

CONTRACTS.

1. Adoption—Husband and Wife.

A husband cannot bind his wife to the adoption of a third party, with all its legal consequences affecting her property, without her assent; and where a plaintiff in a bill in equity bases his right to a decree upon a contract by both husband and wife to adopt him, and proves only an engagement by the husband, the action necessarily fails. *LAZOS vs. MULL*, (No. 2), 210.

2. Bankruptcy—Reclamation of Goods Made on Contract—Delivery. *IN RE WEBER, BANKRUPT*, (No. 1), 233.

3. Base Ball Players—Gate Receipts—Appropriation of Gate Receipts. *HART vs. DICKINSON*, 17.

4. Contemporaneous Oral Agreement as Inducing Cause for Signing Written Instrument—Charge to Jury—Evidence.

Where the evidence of the oral contemporaneous agreement as the inducing cause for the signing of a written contract is clear, precise and indubitable, is not contradicted, and is such as would have convinced the Court sitting as a chancellor, a new trial will not be granted, though the Court in its charge to the jury omitted to instruct them that the evidence to prove the oral agreement must be "clear, precise and indubitable." *DULUTH SUPERIOR MILLING CO. vs. SHANEMAN*, 19.

5. Contract to Adopt Child—Consideration. *GRUBER'S EST.*, 68.

6. Fraud—Undue Influence—Parents and Children.

Business dealings between parents and children and other near relatives are not per se fraudulent, but must be treated as are dealings between ordinary debtors and creditors, and where the bona fides of their transaction is attacked, the fraud alleged must be clearly proved. Where, however, that which invalidates the transaction is clearly proved (and the undue exercise of influence springing from the confidential relation is practically indistinguishable from fraud) that rule is obviously satisfied. *O'REILLY vs. READING TRUST CO., TRUSTEE*, (No. 2), 91.

7. Husband and Wife—Question for Jury. *KNECHT vs. KNECHT*, 125.

8. Life Insurance Policies—Assignment for Value—Option to Repurchase—Death of Assured.

Where, in the liquidation of the assets of a bankrupt, a policy of insurance upon his life is sold at its then surrender value, and the purchaser promises to return the policy to the bankrupt upon reimbursement for its cost, but the former dies without having brought back the policy, his personal representative has no standing to claim the difference between its proceeds and the former sale price. The option to redeem contemplated a policy of an undetermined value, which it remained during the bankrupt's lifetime, not a policy of a determined value which it became after his death. The option, therefore, ended with his death and did not enure to his personal representative. *MANWILLER vs. MANWILLER*, Adm'x (No. 2), 225.

9. Mining Iron Ore on Royalty—Implied Contract to Mine With Diligence—Minimum Royalty as Penalty or Liquidated Damages.

Where the right to mine iron ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner and with reasonable diligence, so that the grantor may receive the compensation or income contemplated when the agreement was entered into, and a consequent liability for damages for non-performance; where, however, the parties expressly agree for a minimum annual output and payment, and the contract itself shows that in the intention of the parties the minimum royalty was to be considered as liquidated damages and not as a penalty, the rule does not prevail, and a failure to mine the ore is no basis for a claim for damages beyond the minimum royalty agreed upon. *SOUTH MOUNTAIN LAND CO. vs. P. & R. COAL & IRON CO.*, 30.

10. Patent Rights—Injunction.

Plaintiff and defendant had entered into an agreement to collaborate in perfecting a self-starting device for automobiles, the plaintiff engaging to furnish certain ideas he had evolved, to provide a car for experiments and to pay the filing fees and expenses for obtaining a patent; the defendant agreeing to do the mechanical work to perfect the device, to make application for a patent and then to assign to plaintiff a half interest therein. Plaintiff complied with his part of the contract, but defendant, after applying for a patent, refused to assign the half interest to plaintiff and attempted to sell the patent rights to a third party. **Held:** that an injunction should issue directing defendant to assign a one-half interest in the patent to plaintiff. *FRITCH vs. SCHAEFFER*, 238.

11. Personal Property—Sale After Inspection—Delivery—Attempted Rescission for Defect in Quality—Judgment n. o. v.

Plaintiffs sued to recover the contract price of 200 barrels of potatoes. Defendants contended that they had bought the potatoes from sample barrels, and that the potatoes shipped were of inferior quality and were for that reason refused. Defendants' testimony showed that their agent called at plaintiffs' receiving station in Philadelphia, where he saw a car of potatoes containing probably 200 barrels; that he examined them, opening four or five of the barrels, and found their condition and quality excellent; that he was told by plaintiffs' agent that the potatoes in the car were supposed to be "of one mark of potatoes, R. I." that he then purchased 200 barrels of these potatoes and received from plaintiffs a slip evidencing the purchase; and that defendants' agent ordered the railroad company to ship the potatoes to defendants at Reading, attaching the slip to the bill of lading to enable the railroad company to get the potatoes from plaintiffs. The jury found a verdict for defendants. On rule for judgment n. o. v., **Held:** that the potatoes were not bought by sample but upon inspection; that there was no evidence that the potatoes delivered were not the potatoes purchased; that defendants' evidence showed a delivery in Philadelphia at the time of the purchase and that defendant had no right to rescind for breach of warranty of quality, had there been one, but could only claim damages therefor; and that plaintiff was entitled to judgment n. o. v. **EDMUNDS vs. PERPETUA**, 200.

12. Public Service Commission—Approval of Contract—Jurisdiction of Court.

The fact that a certificate of approval of the contract had been granted by the Public Service Commission does not take away the jurisdiction of the Court nor prevent its inquiring into the validity of the contract. The powers of the Public Service Commission are administrative, not judicial. **ROTHERMEL vs. SUPERVISORS OF MUHLENBERG TWP.**, 183.

13. Purchase of Shares of Stock—Misrepresentations—Rescission—Notice and Tender—Equity.

Plaintiff filed a bill in equity to annul a contract to purchase 5,000 shares of stock, from defendants for cash and securities, alleging misrepresentations on the part of the president of the company. Defendants contended that the plaintiff was not entitled to a decree because he had failed, before instituting the suit, to give notice of his rescission of the transaction and to offer a return or make a tender of the stock certificates. **Held:** that under the circumstances of the case the plaintiff was not precluded from maintaining his bill by reason of want of notice of rescission or tender.

While, in actions of law, the rule is that notice and tender are ordinarily necessary to sustain a proceeding, unless the subject matter thereof is utterly worthless, yet in equity the rule does not attain with the same rigor as at law, because a decree can nearly always be framed in such manner as to insure justice. In so far as rescission and notice thereof are concerned, the institution of the suit and service of process may themselves be treated as amounting to such. **MEINIG vs. INTERNATIONAL MONEY MACHINE CO.**, (No. 1), 33.

14. Receipt "In Full for All Claims"—Conclusiveness. SCHNADER vs. LIEVER, 223.

15. Sale Conditional Upon Giving Satisfaction to Purchaser.

At the audit of the account of the Receiver of S. Company, an insolvent manufacturer of motor cars, the V. Co. asked allowance

of its claim for the cost of making a number of gear-shift devices alleged to have been contracted for by the company for installation on its cars. The preponderance of the evidence showed that the contract was conditional upon the device proving satisfactory on the cars, and that it had proven unsatisfactory. **Held:** that the auditor properly disallowed the claim. *S. G. V. COMPANY vs. S. G. V. CO.*, (No. 1), 213.

16. Time as of the Essence of the Contract—Waiver.

If time is made of the essence of a contract, it may be waived by the conduct of the purchaser; and if the time is once allowed to pass and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. *STROUT SHOE CO. vs. I. BEAR & CO.*, 27.

17. Unauthorized Return of Merchandise—Delivery to Railroad Company.

Where a purchaser of goods has by his actions waived time as of the essence of the contract and accepts the goods, he cannot, on a suit for the price, defend on the ground that he returned the goods, unless he proves delivery to and receipt of the goods by plaintiff. Delivery to a railroad company is not sufficient. *STROUT SHOE CO. vs. I. BEAR & CO.*, 27.

18. Written Instruments—Mistake—Collateral Assignment Instead of Absolute Assignment.

Plaintiff sued defendant to recover the amount of a policy of insurance on the life of defendant's decedent, which he alleged had been assigned to him for value by decedent. The assignment on its face purported to be as collateral security for present and future indebtedness, but the testimony showed that an absolute assignment had been intended by the parties, but that by mistake the wrong printed form had been used, the error not being discovered until after decedent's death. **Held:** that the jury properly found for plaintiff. *MANWILLER vs. MANWILLER*, ADM'X, (No. 2), 225.

19. Written Instruments—Rescission by Agreement and Substitution of New Contract—Requisites of Proof.

Where plaintiff alleges the revocation by parole agreement of a written lease for a term of years and the substitution of a verbal lease from month to month, the testimony upon which he relies must be clear, precise and indubitable, and must be corroborated by another witness or by proof of confirmatory attending circumstances. *DI PIETRO vs. SAUL*, 230.

CORPORATIONS.

1. Fire Insurance—Payment of Premium by President—Fire Loss—Right to Insurance Money.

In May, 1914, policies of insurance held by the R. Company upon its property expired. Renewals were made out by the insurance agency and delivered to Charles Reichart, president of the company. The company was without funds to pay for the renewals which remained unpaid for but uncanceled and in force until June 20, 1914, when Charles Reichart, with a view to the protection of his and his son's claims against the company, paid the premiums and had the policies marked "Loss, if any, payable to Charles Reichart and Isaac Reichart, judgment creditors as their interest may appear." This was done without the knowledge or consent of the board of directors. A fire destroyed the property and Reichart collected the insurance. **Held:** that the transaction was a taking out on June 20, of insurance on the company's

property by Charles Reichart for the benefit of himself and his son, which the company had no claim upon, except in so far as there may be a surplus in Reichart's hands over and above their just claims against the company. **SNYDER vs. REICHART CLEANING & DYEING CO.**, (No. 2), 156.

2. Fire Insurance—Renewal of Policies—Payment of Premium by President and Unauthorized Assignment to Himself.

Policies of insurance on the property of a corporation being about to expire, R, president of the corporation, renewed the policies in the name of the corporation, paid the premiums himself and, being a creditor of the corporation, had a clause attached to the policies by the insurance companies, making the loss payable to himself and his son, judgment note creditors, as their interests may appear. Subsequently a loss occurred and R made settlement with the insurance companies, the money he received being less than the money owed him by the corporation. A stockholder and creditor filed a bill in equity against the corporation and R, asking that a receiver be appointed; that the loss clause in favor of R be declared null and void, and that R be compelled to account to the receiver of the corporation for the insurance money collected. The Court appointed a receiver. **Held:** that R could not be compelled to surrender the insurance money except upon re-payment to him of the whole amount due him from the corporation; but that he should file an account in order to determine whether there was any balance due the corporation after payment of its indebtedness to R. **SNYDER vs. REICHART CLEANING & DYEING CO.**, (No. 1), 81.

3. Insolvency—Receivership—Audit of Account of Receiver—Claim by Company Substantially Identical With Insolvent Corporation.

At the audit of the account of the Receiver of the S. G. V. Co., a Pennsylvania corporation created for the manufacture of motor cars, the S. G. V. Company, a Delaware corporation, presented a claim for \$146,000, being for moneys alleged to have been loaned the Pennsylvania corporation upon its notes. The evidence indicated that from the time of the formation of the Delaware corporation in 1911 until the appointment of the Receiver for the Pennsylvania corporation, the latter was at all times controlled and its affairs conducted by the former; that its property and assets held in its name were in fact purchased and owned by the Delaware corporation; and that the business of the manufacture and sale of automobiles at Reading was not even nominally conducted by the Pennsylvania corporation, but was in every particular managed, controlled and conducted by the board of directors of the Delaware corporation at its monthly meetings. The evidence also showed that the Delaware corporation was not registered in Pennsylvania. **Held:** that the master properly disallowed the claim.

The Delaware corporation "not only acquired the control and property of the Pennsylvania corporation, but it used and operated that corporation as an adjunct or instrumentality for the accomplishment of its own purposes, creating a substantial identity between the two, which, in order to the administration of justice and equity and the avoidance of palpable injustice and inequity, must be deemed to render insignificant their artificial separate personalities. When the Delaware corporation put its money into the Pennsylvania corporation, it put it into its own enterprise, as owner of the Pennsylvania corporation and business, not into another's enterprise by way of loan as a creditor dealing with a debtor. What it chose to call these supplies of money is of no serious moment. The law pays little heed to the label parties put upon their transactions." **S. G. V. COMPANY vs. S. G. V. Co.**, 217.

4. Receivers—Pending Suits.

A judicial proceeding instituted before the appointment of a receiver and pending at the time of his appointment does not abate, if the receiver makes no objection to its going on. It may, with his assent, be prosecuted for his benefit in the name of the original party, or he may apply to the Court to be made a party to it, and continue it himself as such. In one way or another he has a right to control it so long as it has not been carried to final decree. *SNYDER vs. REICHART CLEANING AND DYEING CO.*, (No. 1), 81.

5. Sales of Capital Stock—Fraud by President—Responsibility of Corporation.

A corporation is responsible for a fraud practised by its president in a sale of stock, in the sense that it cannot be permitted to retain the benefits of the transaction. *MEINIG vs. INTERNATIONAL MONEY MACHINE CO.*, (No. 1), 33.

6. Stock Purchases—Misrepresentations—Injury to Purchaser.

Where a person is induced to buy stock in a corporation on representations that all but a small portion of the price paid would go into the treasury of the corporation and be used for its purposes, and it subsequently appears that 45% of the purchase price was diverted from the treasury to the company's fiscal agent, a financial detriment to the plaintiff as a stockholder of the company results. *MEINIG vs. INTERNATIONAL MONEY MACHINE CO.*, (No. 1), 33.

COSTS.

1. Costs—Duplication—Act 10 March, 1905, P. L. 35.

P, treasurer of a lodge, was convicted on two indictments for embezzlement of moneys received by him from members in payment of dues. Each indictment contained three counts, each count specifying one act of embezzlement. The evidence showed that the lodge met once a month at which time the treasurer should have reported all collections for the preceding month; and that of the six sums embezzled, two had been received in January, two in March and two in June, the whole within the space of six calendar months.

On exceptions to taxation of costs, **Held**: that the time of embezzlement was the time when defendant should have reported the receipt of these sums at the regular meetings of the lodge, and there being but three acts of embezzlement within the space of six months, but one bill of indictment was necessary; and that under Act 10 March, 1905, P. L. 35, costs should be allowed in but one case. *COM' TH vs. POTTEIGER*, 180.

CRIMINAL LAW.

1. Bigamy—Common Law Marriage—Evidence—Question for Jury.

Defendant was convicted of bigamy, it being charged that he contracted a second marriage while his common law wife was still living. To prove the common law marriage, evidence was adduced to show that they had lived together for 20 years, were always known as Mr. and Mrs. Granville Frey, had joined church together, had their child baptized under the name of Frey, and were reputed to be man and wife in every community in which they lived. It was also shown that shortly after they started living together defendant obtained a divorce from his then wife, whereupon they changed their relations to that of man and wife, and thereafter defendant always called her his wife; that he told

her it was not necessary to go to a minister; that before the birth of their child, she wanted to have a marriage ceremony performed, but defendant said it was not necessary and said "we are man and wife. I am your husband and you are my wife." She replied, "I am satisfied." On rule for new trial, **Held:** (1) that the evidence was sufficient to warrant the jury in finding that there had been a common law marriage; and (2), that the relationship and conduct of the parties and the birth of their child were sufficient to overcome the presumption arising from their former illicit relations. **COM'TH vs. FREY, 22.**

2. Bigamy—Common Law Marriage—Evidence as to Invalidity of Marriage Incompetent—Act 27 March, 1903, P. L. 102, Sec. 1.

Under Sec. 1, Act 27 March, 1903, P. L. 102, a person can be convicted of bigamy whether the marriage be valid in law or not, if not legally annulled and void by the decree of a proper court of record. Evidence is therefore inadmissible and is properly rejected when offered to show that defendant's common law marriage was void for the reason that he had been divorced by his former wife on a libel charging adultery with the woman who became his common law wife, and that therefore they could not legally marry, his former wife being still alive. **COM'TH vs. Frey, 22.**

3. Breaking and Entering With Intent to Steal—Attempts—Act 31 March, 1860, Sec. 50, P. L. 442.

Defendant was indicted for feloniously breaking and entering a certain garage with intent to steal the goods therein. The jury found the defendant guilty of an attempt to feloniously enter and break the garage with intent to steal the goods. **Held:** refusing a new trial, that the jury would have been justified under the evidence, in finding the defendant guilty of actual entry and breaking, but found him guilty merely of the attempt, as they had the right to do, under Act 31 March, 1860, Sec. 50, P. L. 442. **COM'TH vs. HEISLER, (No. 1), 102.**

4. Costs—Quarter Sessions—Two Indictments—Duplication. COM'TH vs. POTTEIGER, 180.

5. Larceny—Evidence—New Trial.

A new trial will not be granted after a conviction on the charge of larceny where the evidence shows a stolen automobile found in the possession of the defendant a few hours after the theft occurred, with a changed license, the ornament removed, the top turned down, and the defendant in company with another man who had charge of another car stolen at about the same time and place, and the defendant offers no satisfactory explanation of his possession of the stolen car. **COM'TH vs. BROWN, 57.**

DECEDENTS' ESTATES.

1. Claim on Partnership Notes—Evidence.

At audit, S presented a claim on four notes made by him and decedent jointly which he claimed the latter had agreed to assume. The evidence showed that S and the decedent had been in partnership and had effected a dissolution. An alderman who assisted in the dissolution testified that at the time when the settlement was made, there was an equity in favor of S, and the decedent had agreed to assume "all joint notes." Four partnership notes were put in evidence. The estate admitted the notes as joint obligations but objected to their payment in whole out of the estate on the ground that claimant had failed to identify them as notes which the decedent had agreed to pay. **Held:** that the claim was sufficiently proven. **SENSENG'S ESTATE, 106.**

2. Contract to Adopt Child—Consideration.

Claimant asked for the distribution to her of the whole of the estate of decedent, basing her claim upon a contract made by her mother with the decedent when the claimant was a child, by the terms of which the decedent took the claimant into his family with the intention of raising her as his child, and agreed that claimant was to get everything he had at his death if she would stay with them until she was married. The claimant took decedent's name and lived in his family until her marriage. The relation of parent and child with her own mother was not severed. The accountant resisted the allowance of the claim on the ground that the contract was against public policy and therefore void. The evidence showed that claimant's mother had been deserted by her husband, and was in destitute circumstances, and that the contract was greatly to the benefit of the child. **Held:** that the contract was enforceable. GRUBER'S EST., 68.

3. Counsel Fees.

Where counsel for the accountant conducted extensive litigation in another state involving the establishment of the estate's claim against a deceased debtor's estate and the sale of various pieces of real estate to enforce the judgments recovered, resulting in the estate receiving a fund of \$25,000, a counsel fee of \$1,800 for the litigation is reasonable and will be allowed. LANDIS' EST., 242.

4. Partial Intestacy—Widow's Claim Under Intestate Laws—Act 1 April, 1909, P. L. 87.

Testator devised to his widow a life estate in the whole of his estate, real and personal, but failed to make disposition of a portion of his personal estate after her death, there being therefore a partial intestacy. Testator left no issue, and the widow, in addition to the life estate given her by the will, claimed under the intestate laws the \$5,000 given by the Act of 1909, and one-half of the rest of the personal property absolutely. **Held:** that the Act of 1909 has always been regarded as part of the intestate laws, and applies whether there is a total or partial intestacy; that the widow's rights at law having vested at testator's death, she, being also the life tenant, is presently entitled to the distribution asked for. KIRBY'S EST., 94.

DIVORCE.

1. Cruel and Barbarous Treatment and Indignities to Person by Wife—Evidence.

A husband filed a libel in divorce against his wife on the ground of cruel and barbarous treatment and indignities to person. He testified that they were married in 1875 and separated in 1911; that his wife had refused to get his breakfast, called him uncomplimentary names, that they had quarreled at his father's funeral, that in 1899 she had knocked him down with a frying-pan, that shortly before he left she threatened to use a butcher knife on him if he came into her sleeping-room, that she threatened to throw vitriol in his face if she caught him with other women, that she refused to occupy the same sleeping-room with him and quarreled with him almost daily. At a subsequent hearing he testified as to certain unnatural practices he claimed his wife requested of him. The respondent and two sons contradicted this testimony. Libellant admitted that when one of his children was a week old and the respondent still sick in bed he had a dispute with his mother-in-law, whereupon he left the house and stayed away two and a half years and contributed to their support only after he was brought into Desertion Court. At another time he left his wife and children without making provision for their support. The respondent's witnesses testified to many acts of libellant against respondent.

Held: that libellant had failed to establish by evidence the truth of the allegations contained in his libel, and that the libel should be dismissed. *SCHELL vs. SCHELL*, 6.

2. Desertion—Evidence.

A divorce will not be granted on the ground of desertion where the husband, the libellant, testifies that when they were obliged to leave his house because it had been sold at sheriff's sale, he asked his wife to go with him to Hyde Park, where he had rented a house, and she refused; and the only additional witness for libellant testified that he had been engaged to haul libellant's goods from his residence to Hyde Park; that he loaded libellant's plumbing tools, but no furniture; that then libellant asked his wife to go along, and she answered, "No, I won't go along with you," and that then libellant replied, "Oh, that is all I want to know." Respondent denied that she refused to live with him, and it was shown that after the separation libellant never attempted a reconciliation, and did not support his wife or children until an order was made against him in the Quarter Sessions Court. *BURKHARD vs. BURKHARD*, 46.

3. Desertion—Evidence of Libellant—Subsequent Conduct as Affecting His Evidence.

In a suit for divorce on the ground of desertion the evidence given by the libellant on the matter of desertion must be viewed in the light of his subsequent conduct. *BURKHARD vs. BURKHARD*, 46.

4. Desertion—Evidence—Non-Support.

A husband's failure to support his wife is not itself a desertion within the meaning of the divorce law; neither does an allowance made in a proceeding for non-support in the Quarter Sessions, standing alone, establish such desertion. *STEFFY vs. STEFFY*, 93.

5. Desertion—Non-Support.

A wife asked for a divorce on the ground of desertion. The testimony showed that it was she who left her husband. She testified that the reason for leaving him was his failure to support her and because he had told her to go. It appeared that during the two years of their married life, the respondent was in the habit of telling her to leave him. **Held;** that the libel should be dismissed. *STEFFY vs. STEFFY*, 93.

6. Desertion—Offer to Resume Marital Relations.

A divorce on the ground of desertion will be refused and the libel dismissed where the evidence shows that within two years after the alleged desertion the respondent returned to her husband's home and offered in good faith to resume marital relations with him, which he refused. *TUCKEY vs. TUCKEY*, 193.

7. Prior Divorce Action as a Bar—Res Adjudicata.

A libel in divorce will be dismissed and the divorce refused where the evidence shows that the libellant had previously begun a divorce action upon the same grounds against the respondent in another jurisdiction, in which action the divorce had been refused by the Court on the merits of the case.

The fact that the Court's opinion in refusing the divorce in the prior case upon the evidence and facts, referred to the question of jurisdiction as a possible objection to the entry to any degree in favor of the libellant, does not prevent the decree from being a bar on the principle of res adjudicata. *SCHARADIN vs. SCHARADIN*, 130.

EQUITY.

1. **Building Restrictions — Construction.** DEELMAN vs. SHERMAN, 182.

2. **Chancery Rule of Evidence—Act 28 May, 1913, P. L. 358—Equitable Matters in Actions at Law.**

Act 28 May, 1913, P. L. 358, abolishes the chancery rule of evidence necessary to meet a responsive answer, which therefore becomes inapplicable to equitable matters set up in cases at law, except where an attempt is made to reform or overthrow a written instrument. YODER vs. HERTZOG, 206.

3. **Estoppel—Requirements.**

An estoppel can never work in favor of one who is not misled by the fact relied upon as creating it.

Where there is an obligation of inquiry (as it was upon the Borough with respect to the title of the property) whatever information that inquiry diligently pursued would lead the party asserting an estoppel to acquire, is imputed to him.

Knowledge in the party to be estopped is an essential condition of estoppel. SHANEMAN vs. WEST READING BOROUGH, 132.

4. **Injunction — Patent Rights — Contracts.** FRITCH vs. SCHAEFFER, 238.

5. **Partnership—Bill for Accounting.** LAZOS vs. MULL, (No. 1), 134.

6. **Water-Courses—Right of Riparian Owner—Waste—Injunction.** ALLENTOWN PORTLAND CEMENT CO. vs. HUY, 54.

EQUITY PRACTICE. (See Practice, Equity.)

EVIDENCE.

1. **After Discovered Evidence—Requisites for Granting New Trial.** BELL vs. JACOBS, 149.

2. **Chancery Rule — Responsive Answer.** YODER vs. HERTZOG, 206.

3. **Competency of Witness—Act 23 May, 1887, P. L. 159, sec. 5.**

In an action in equity to set aside a trust agreement executed between a father and his daughters with relation to property, the father's right to which ended at his death and did not pass to any party on the record representing his interest, the daughters are not prohibited by the provisions of the Act 23 May, 1887, P. L. 159, sec. 5, from testifying, after the father's death, as to how they were led by him to execute the agreement. O'REILLY vs. READING TRUST CO., TRUSTEE, (No. 1), 39.

4. **Death of Party—Competency—Act 23 May, 1887, Sec. 5, (E), P. L. 159.**

Where the subject of a suit is a promissory note given by defendant to an executrix in payment of a debt due the decedent, the testimony of the executrix is competent to show the consideration by stating what was said to her by the defendant at the time the note was given. The Act of 1887 does not apply, as the giving of the note was a transaction between the witness and the defendants, and not between the decedent and the defendants.

In such a case the testimony of the defendant that she was not indebted to the estate of decedent is incompetent, since such testimony would relate to transactions between the witness and the decedent, and fall within the provisions of the Act of 1887. BEAM, EX'X. vs. RICHARD, 62.

5. Rebuttal—Admissibility.

Evidence by plaintiff in rebuttal was admitted to show the perfect condition of the motorcycle at the time of the collision by proof of its condition on the day before and immediately after the accident. There had been evidence by the defense from which a defective condition might possibly have been inferred by the jury. **Held:** no error. *BELL vs. JACOBS*, 149.

6. Receipt "In Full for All Claims"—Conclusiveness.

A receipt "for work and supplies in full up to date, for all claims," is not conclusive, and will not bar the recovery of another account owing at the time the receipt was given, where the evidence shows that the receipt did not express the true state of facts and was not intended or understood to include the other account. The case is for the jury on the evidence.

"A receipt is like any other parol admission of the party, and is open to explanation or correction; and he may show that it was made by mistake, or does not exhibit the real state of facts." *SCHNADER vs. LIEVER*, 223.

7. Witnesses — Credibility — Character Witness. COM' TH vs. BROWN, 57.

8. Written Instruments—Rescission by Agreement and Substitution of New Contract—Requisites of Proof. DI PIETRO vs. SAUL, 230.

EXECUTORS AND ADMINISTRATORS.

1. Counsel Fees—Executor's Compensation—Stipulation in Will—Additional Compensation. LANDIS' EST., 242

FEES.

1. Counsel Fees—Decedents' Estates. LANDIS' EST., 242.

GUARDIAN AND WARD.

1. Appointment — Religious Faith of Parents of Minors—Fiduciaries Act 7 June, 1917, Sec. 59, P. L. 529.

The Fiduciaries Act of 1917 re-enacts the provisions of Act March 29, 1832, and makes it the imperative duty of the Court to appoint a guardian of the person of a minor of the same religious faith as that of the parents, if it can be done without materially affecting their temporal welfare. *SPENCER'S EST.*, 171.

2. Appointment—Revocation.

Where the Orphans' Court has appointed a maternal aunt as guardian of two orphan minors, on petition of a cousin of their mother's, the court will not subsequently remove the guardian because no notice of the application for the appointment had been given to the paternal aunt and grandfather of the children, such notice not being required under the rules of Court. *SPENCER'S EST.*, 171.

3. Contract.

Where a guardian is appointed by the Orphans' Court on a petition preferred by the ward at the instance and direction of her father, the act of the guardian in executing an agreement between the ward and her father is to all intents and purposes to be considered as the act of the ward. *O'REILLY vs. READING TRUST CO., TRUSTEE.* (No. 1), 39.

4. Removal—Act 29 March, 1832, Sec. 12, P. L. 192.

The Orphans' Court has power to remove a guardian only on due proof of his mismanagement of the minor's estate or misconducting himself in respect to the maintenance, education or moral interests of the minor. *SPENCER'S EST.*, 171.

5. Support by Third Party Without Consent of Guardian—Compensation—Trial by Jury.

Where a person gives board and lodging to a weak-minded person without contracting with his guardian, the Court, on petition for a decree for payment, will refer the case to a jury on the questions of quantum of compensation and of the imperative necessity existing to warrant claimant in providing support for the ward without the guardian's consent. *IN RE WATSON HOCH*, 215.

HUSBAND AND WIFE.

1. Contracts—Question for Jury.

Plaintiff sued defendant to recover \$1,800, and alleged in her statement of claim that she was the wife of defendant; that she had entered into an agreement with him under which she gave him her wages from time to time upon his promise to invest the money and account to her for it, with accumulated interest; and that after this arrangement had been carried on for a number of years he deserted her and refused to pay back the money. The defendant's affidavit of defense denied the marriage, the alleged promise to return the money, and the desertion; and averred a contract with plaintiff that he should receive her wages and pay her board and other necessities therefrom; and that he had expended for her more than he had received, and asked for a certificate in his favor for the balance. The jury found for the plaintiff. On rule for new trial, **Held**: that the allegation of marriage and desertion in plaintiff's statement was not necessary to entitle the wife to sue, and that the only issue presented by the pleadings was whether the contract was as alleged by the plaintiff or by the defendant, which was for the jury. *KNECHT vs. KNECHT*, 125.

2. Conveyance by Husband to Wife—Presumptive Gift—Creditors—Evidence.

Where a husband transfers either real or personal property to his wife, the presumption is that it is a gift, and as to persons who are creditors at the time it is void and fraudulent. In a contest with creditors of the husband it is necessary for the wife to establish that the conveyance was to secure her debt, and every element necessary to sustain her claim must be established by clear and satisfactory evidence. *NATIONAL UNION BANK vs. FRANKHAUSER*, 195.

3. Proceedings for Support by Deserted Wife—Service Outside Jurisdiction—Constitutionality—Legacy as Property. *NOLDE vs. NOLDE*, 1.

4. Real Estate—Implied Agency of Husband.

There is, touching a wife's property rights, no presumption of agency for her in the husband by virtue of the marital relation. There must be specific authorization. *SHANEMAN vs. WEST READING BORO.*, 132.

5. Right of Wife to Sue for Recovery of Her Separate Property—Act 27 March, 1913, P. L. 14—Act 8 June, 1893, Sec. 3, P. L. 344.

Under Act 27 March, 1913, P. L. 14, which, inter alia, amends Sec. 3, Act 8 June, 1893, P. L. 344, desertion or separation without

cause is no longer made a prerequisite to the right of a wife to maintain a suit against her husband for the recovery of her separate property. *KNECHT vs. KNECHT*, 125.

INJUNCTIONS. (See also Equity).

1. Public Playgrounds—Nuisance.

An injunction will not be granted to restrain the maintenance of a public playground in a built-up section of a city unless the evidence shows that it constitutes a nuisance.

"To hold the injunction prayed for grantable upon the facts of this case, would be tantamount to declaring the maintenance and operation of playgrounds impossible within the built-up limits of a city, and, if sustained, would eventually wipe them out. Such a result, deplorable from many standpoints, cannot be regarded as consistent with public interest and recent legislation or as demanded by the rights of private property owners." *STAAB vs. READING SCHOOL DISTRICT*, 86.

INSURANCE (FIRE).

1. Corporations—Payment of Premium by President as Individual—Loss—Right to Insurance Money. *SNYDER vs. REICHART CLEANING AND DYEING CO.*, (No. 2), 156

2. Corporations—Renewal of Policies—Payment of Premium by President and Unauthorized Assignment to Himself. *SNYDER vs. REICHART CLEANING AND DYEING CO.*, (No. 1), 81.

INSURANCE (LIFE).

1. Life Insurance Policy—Assignment With Option to Repurchase—Death of Assured. *MANWILLER vs. MANWILLER*, *ADM'X*, (No. 2), 225.

LANDLORD AND TENANT.

1. Bankruptcy of Tenant—Surrender by Trustee—Rent Claim for Unexpired Term. *IN RE FIES, BANKRUPT*, 241.

2. Dangerous Structure—Removal by Landlord at Instance of Fire Authorities—Eviction.

Plaintiff leased to defendant a property with a shedding upon it, the lease providing that the lessee should make needful repairs. During the term, plaintiff was notified by the fire authorities that the shedding was dangerous and must be made safe or removed. Defendant neglected to make the repairs and plaintiff entered upon the premises and removed part of the shedding. Defendant vacated the premises and refused to pay rent, claiming an eviction. At trial plaintiff contended that defendant had consented in advance to plaintiff's action or had subsequently by his acts waived it as an eviction. The jury found a verdict for defendant. Rules for new trial and for judgment n. o. v. discharged. *FELIX vs. BREY*, 204.

3. Eviction—Waiver—Question for Jury.

Any material interference by the landlord with the tenant's quiet and peaceable possession and enjoyment of the leasehold in whole or in part constitutes an eviction; which is a defence in a suit for rent.

Every contract is presumed to be made with reference to the existing law of the land, but non-interference with the tenant's term is a condition precedent to his liability for rent. The rule is that no amount of hardship or impossibility or illegality will avoid the bar of a condition precedent unperformed.

The question of waiver of the effect of the eviction was for the jury. **FELIX vs. BREY**, 204.

4. Lease Executed by Agent Without Disclosing Principal.

Where an agent, without disclosing his principal, executes a lease of a house in his own name, the tenant holds under the agent; and it makes no difference that the agent in signing the lease wrote the word "agent" after his signature. **POULTON vs. ELY**, 48.

5. Proceedings to Recover Possession—Act 31 March, 1905, P. L. 87—Plaintiff's Agent as Lessor—Certiorari.

Suit was brought before an alderman in the name of McGowan as agent for Ida Poulton et al. against Esther Ely, to recover possession of certain real estate alleged to have been leased to the defendant for an indeterminate term. The record of the alderman showed that the lease for the premises had been made with the defendant by Samuel N. Potteiger, agent. There was nothing to show that Ida Poulton was the original lessor or had acquired title to the property by descent or purchase from the original lessor. The alderman entered judgment for plaintiff. On certiorari, **Held**: that the record was fatally defective. **POULTON vs. ELY**, 48.

6. Recovery of Possession—Indeterminate Term—30-Day Notice to Remove—Act 21 March, 1772, Sec. 12, 1 Sm. 373—Act 10 April, 1905, P. L. 135—Act 14 December, 1863, P. L. 1125.

In a landlord and tenant proceeding under Act 21 March, 1772, 1 Sm. 373, to recover possession of premises held by the tenant for an indeterminate term at a monthly rental, a 30-day notice to remove is sufficient. The Act 10 April, 1905, P. L. 135, providing for a 30-day notice applies not merely to Act 14 December, 1863, P. L. 1125, but also to the Act of 1772, when a proceeding is had thereunder to obtain possession from a tenant at will. Where the duration of the term is left uncertain the lessee holds ab initio as a tenant at will. **YOUNGERMAN vs. CHRIST**, 16.

MAGISTRATE'S COURTS. (See Appeals).

NEGLIGENCE.

1. Automobiles—Collision at Street Crossings—Right of Way.

It has been laid down as a general rule that one reaching the intersection of a street first has the right of way, and in determining whether he can safely cross he need not anticipate a sudden violation of the law of the road by an approaching driver. This is in line with the doctrine repeatedly laid down by our Supreme Court, that a man is not required to guard against the unexpected negligence of another, but is at liberty to presume that the other party will act in conformity with the law and his duty—especially where that party fails to give any signal capable of being understood as a warning that he intends to arrogate to himself the right of way. **MORGAN vs. DUCHYNSKI**, 123.

2. Automobile Collision—Contributory Negligence of Driver as Attributable to Passenger.

In a suit for damages for personal injuries resulting from a collision between an automobile and a motorcycle, the contributory negligence of the driver of the motorcycle is not to be imputed to a passenger, even though she is the wife of the driver, where the evidence fails to show that she joined in testing a manifest danger. **BARGER vs. STELWAGON MFG CO.**, 232.

3. Contributory Negligence—Evidence—Question for Jury—City Ordinance—Conflict With Automobile Law. BELL vs. JACOBS, 149.

4. Contributory Negligence—"Stop, Look and Listen" Sign—Unusual Location of Sign.

Where a railroad crossing is approached over a covered bridge spanning a stream, the far approach to which is by a steep road running at right angles to the bridge entrance, the Court cannot say as a matter of law that a passenger in an automobile is negligent for not observing a "stop, look and listen" sign fastened to the side of the bridge entrance at the height of the rafters, about 9 feet from the ground. The place was an unusual one for such a sign and was facing the occupants of the car only when they were making the right angle turn into the bridge, when their attention would naturally be directed to observing conveyances coming from the bridge. *WANNER vs. P. & R. RY CO.*, 9.

5. Damages—Exemplary Damages—Charge of Court—New Trial.

In order to lay ground for the recovery of punitive damages in a personal injury case, it is not necessary that the declaration expressly claim such; it is enough if the pleadings and evidence entitle the plaintiff to ask them. In such case there is no error in the admission of the examination of the defendant as to his financial ability, or in negating his point forbidding the jury to allow punitive damages; but in submitting the matter to the jury it is essential that the jury be informed by the Court as to the conditions which circumscribe the allowance of any but compensatory damages. Where this requisite is not met, a new trial should be granted. *GRIESEMER vs. HENRY*, 191.

6. Evidence—Nonsuit.

Plaintiff sued to recover damages for the loss of a horse hired from him by defendant and claimed to have been injured through defendant's negligence. Plaintiff's evidence showed that defendant's driver took the horse to the stable of a hotel in Bernville where he unhitched it and allowed it to graze along the roadside; that the horse wandered into the stable; that the hostler upon inquiry from the driver, said "that is all right, I just put hay in the stall;" that the horse in walking about the stable stepped upon a plank pump bed covering a well, the boards of which were in a rotten condition and gave way, throwing him into the well, whereby he sustained injuries which necessitated his being killed. There was no evidence that the driver knew of the rotten condition of the pump bed, which was not such as to be plainly apparent. **Held:** that a non-suit was properly entered, since the evidence showed that the cause of the accident was the rotten condition of the pump bed, for which defendant was not responsible. *BYLER vs. GREAT A. & P. TEA CO.*, 178.

7. Justices of the Peace—Jurisdiction—Injuries to Automobile—Negligence.

Where an action in assumpsit is brought before a justice of the peace to recover for injury to an automobile sustained by reason of the alleged negligence of supervisors in not providing guard-rails for a dangerous piece of road, the judgment will be reversed on certiorari, the cause of action being in reality trespass and not assumpsit, and the justice having no jurisdiction. *MERTZ vs. GREENWICH TOWNSHIP*, 118.

8. Railroads—Crossing Accident—Negligence—Contributory Negligence—Question for Jury.

Plaintiff sued defendant to recover damages for the death of her husband from injuries received in a grade crossing collision between a train on defendant's railroad and a hired automobile in which he was riding. The evidence showed that the crossing was a particularly dangerous one. It appeared that the engine whistle was sounded at the whistling post 1,326 feet distant from the crossing, but the evidence as to the ringing of the bell was conflicting. The case was submitted to the jury, which found a verdict for plaintiff. On rule for judgment n. o. v., **Held:** that it was a question for the jury whether the engine bell was rung and whether the warnings given by the approaching train were sufficient to show due care under the circumstances. **Held,** further, that the contributory negligence, if any, of the driver of the automobile could not be imputed to the passenger, unless the danger was manifest, and the passenger, by his failure to object, joined the driver in testing such danger. Whether or not the danger was manifest was a question for the jury. **WANNER vs. P. & R. RY. CO., 9.**

9. Railroads—Negligence—Sufficiency of Warning Signal.

It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing, unless it appears that under the circumstances of the case such a signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. **WANNER vs. P. & R. RY. CO., 9.**

NEGOTIABLE INSTRUMENTS. (See Bills and Notes.)

PARENT AND CHILD.

1. **Contracts — Fraud — Undue Influence.** **O'REILLY vs. READING TRUST CO., TRUSTEE, (No. 2), 91.**

PARTNERSHIP.

1. **Equity—Bill for Accounting.**

Where a person is still a member of a partnership, or has been forced out by the wrongful conduct of the other partners, he is entitled to ask for an accounting, but where he himself broke the contract of partnership and voluntarily withdrew from it, he has no such right and a bill in equity asking for an accounting will be dismissed. **LAZOS vs. MULL, (No. 1), 134.**

PLEADING.

1. **Damages—Claiming Exemplary Damages.** **GRIESEMER vs. HENRY, 191.**
2. **Promissory Notes—Suit by Executrix.**

Where an executrix accepts a promissory note made to her individually by a creditor of the estate, she may sue upon the note either individually or as executrix. **BEAM, EX'X. vs. RICHARD, 62.**

POOR DIRECTORS.

1. **Contract of Employment—Physicians' Salaries.**

Where poor directors employ two physicians who alternate in attendance upon the sick from week to week, so that each serves in reality only half of each year, and one sues for his salary, it is no defense to say that he should be paid but half of the com-

pensation claimed, unless it is alleged that this method of service was contrary to his contract of employment. **BINGAMAN vs. POOR DIRECTORS**, 43.

2. Failure to Defend Suit—Petition of Taxpayer to Intervene as Party Defendant—Insufficiency of Suggested Defense.

The petition of a taxpayer to intervene as party defendant in a suit against poor directors will not be granted where the proposed defense to the suit, as given in his petition to intervene, would be insufficient to prevent judgment for the plaintiff. **BINGAMAN vs. POOR DIRECTORS**, 43.

3. Suit for Physicians' Salary—Collusion in Appointment.

Where a physician is employed by poor directors and sues to recover his salary, it is not a sufficient defense to allege that his employment was by collusion between the poor directors, where there is no allegation that the physician was a party to the alleged collusion. **BINGAMAN vs. POOR DIRECTORS**, 43.

4. Suits Against Poor Directors—Intervention of Taxpayer—Opinion of Taxpayer as to Suggested Defense.

The opinion of a taxpayer, unless founded upon facts sufficient for a defense, does not go to the merits of the claim so as to entitle him to intervene. **BINGAMAN vs. POOR DIRECTORS**, 43.

PRACTICE, C. P.

1. After-Discovered Evidence—Requisites for Granting New Trial.

To justify the setting aside of a verdict on the ground of newly-discovered testimony, the latter must be such that on a re-trial the jury not only might be induced by it to give a different verdict, but that it would require them to do so. Even the proven perjury of a witness may not necessarily in itself be ground for interference with the verdict, though not discovered until after the trial. **BELL vs. JACOBS**, 149.

2. Appeals From Aldermen's Judgments—Plea—Practice Act of 1915, P. L. 483.

The Practice Act of 1915 applies to appeals from aldermen's judgments and a rule on defendant to plead will be discharged. When the appeal is entered in the Common Pleas the case begins de novo and is thenceforth to be conducted under the Practice Act. **EGE vs. ARNOLD**, 177.

3. Changing Theory of Case on Argument for New Trial.

Where a case has been tried and submitted to the jury upon one theory, a verdict returned therein cannot be reviewed and disturbed on a different theory. **MILLER vs. GERY**, 211.

4. Contracts—Husband and Wife—Question for Jury. KNECHT vs. KNECHT, 125.

5. Contracts for Benefit of Third Party—Enforceability.

A contract is enforceable by the party for whose benefit it was made, although not a party to it. **GRUBER'S EST.**, 68.

6. Contributory Negligence—Evidence—Question for Jury.

In a damage case arising out of a collision between a motorcycle and an automobile, the defendant, by close measurements and calculations based upon the testimony of witnesses as to the location of the automobile before and after the collision, sought to show that plaintiff's decedent had room enough to pass the automobile in safety and that his unsteady driving and failure to take advantage of the opportunities were responsible for his injury. **Held:** that these matters were for the jury on the question whether he exercised proper care or not, and that they did not furnish such conclusive proof of his improper management of the motorcycle as to warrant the Court in pronouncing it, as a matter of law, contributory negligence. *BELL vs. JACOBS*, 149.

7. Exemplary Damages—Essentials of Submission to Jury by Court. GRIESEMER vs. HENRY, 191.

8. Impeaching Credibility of Witness After Trial—After-Discovered Evidence—New Trial.

Defendant asked for a new trial on the ground that one of defendant's principal witnesses had, after trial, admitted in writing that he had been offered money by some one to testify as he did, and that his testimony was incorrect in certain particulars. Depositions were taken by both sides, and defendant contended that the matter cast such a degree of suspicion on plaintiff's case as to require the setting aside of the verdict. The important part of what he testified to at the trial had been also given in evidence by another witness whose credibility was not impeached, and no attempt at corruption was brought home to anyone connected with the case. **Held:** that it must be considered an effort to impeach, on the ground of after-discovered matter, the credibility of a witness, which is ordinarily not enough to warrant the granting of a new trial. *BELL vs. JACOBS*, 149.

9. Jury Trial—Failure to Except to Charge of Court—Subsequent Allowance of Exception by Court—Act 11 May, 1911, Sec. 2, P. L. 279.

The Court, in the exercise of its discretion under Sec. 2, Act 11 May, 1911, P. L. 279, will, in a proper case, allow an exception to the charge of the Court even after verdict; though, no exception having been asked for at the trial, the exception entered subsequently involves no certification that there was such a request, as in the case of exceptions generally. *QUINTER vs. QUINTER*, 87.

10. Negligence—Injuries to Automobile—Jurisdiction of Justice of the Peace. MERTZ vs. GREENWICH TWP., 118.

11. Negotiable Instruments—Liability to Holder in Due Course. BRENDLE vs. SCHMEHL, 105.

12. New Trial—Evidence—Verbal Statements—Conflicting Evidence—Question for Jury.

Where there is conflicting evidence as to certain verbal statements made by defendants to plaintiff, alleged to constitute false representations of the indebtedness of a company, the question is for the jury, and the finding that the words used were those as claimed by plaintiff can not be said to be against the weight of the evidence. *HALTZEL vs. PRINTZ AND FULMER*, 158.

13. New Trial—Verdict Against the Weight of the Evidence.

In the suit to recover damages on the ground that defendants had fraudulently induced plaintiff to sell them his stock in a corporation for \$15,000, which was less than its true worth, by false representations that the company had an indebtedness of

\$140,000, a verdict in favor of plaintiff will be set aside and a new trial granted on the ground that the verdict was against the weight of the evidence, where the inherent improbability of plaintiff's belief in the alleged representations is manifest from the evidence. **HALTZEL vs. PRINTZ AND FULMER**, 158.

14. Oral Testimony—Question for Jury Where Testimony Is Uncontradicted.

Where the establishment of a question of fact depends upon oral testimony, the credibility of the witnesses is for the jury alone, and it is their exclusive province to determine whether, from such testimony, the fact in dispute has been established, even though the testimony is uncontradicted. **NATIONAL UNION BANK vs. FRANKHOUSER**, 195.

15. Plaintiff's Statement—Allegata and Probata—Interpleader.

The rule as to the agreement between allegata and probata obtains in an interpleader proceeding, but it can hardly be invoked to preclude proof of purchase by the plaintiff through an agent under an allegation of purchase by the plaintiff. The contract of an agent of an undisclosed principal is the contract of the latter. **YODER vs. HERTZOG**, 206.

16. Points for Charge—Trial—Charge of the Court.

A point for charge which assumes a fact in dispute cannot be affirmed, although other portions of the point may not be objectionable. In order to avail, a point must be capable of a simple affirmance without qualification. The Court is not called upon to take the good part of the request from the bad and to charge the good.

It is not error to refuse a point asking the Court to charge that "if the jury believe that the defendant's automobile was not, at the time of the accident, being operated or controlled by the defendant, the verdict must be for the defendant;" where there was no evidence negating its control by defendant. The submission of a question of fact to the jury without evidence is necessarily error. **BELL vs. JACOBS**, 149.

17. Presence of Plaintiff's Children at Trial—Possible Harmful Influence on Jury.

The presence of plaintiff's children in the court room at the trial cannot be held to have been prejudicial to defendant, or to entitle him to a new trial because of the harmful influence possibly exerted upon the jury, where there is nothing to show that their presence had any effect upon the jury. If their mere presence was objectionable to defendant it would have been competent for him to ask for relief at the time. Having chosen to remain silent, it is too late to raise such an objection on mere supposition. **BELL vs. JACOBS**, 149.

18. Province of Court and Jury—Reformation of Written Instrument—Assignment.

Where, in an issue to determine whether a written assignment of an insurance policy purporting to be as collateral security, should, by reason of mutual mistake of the parties at its execution, be reformed to an absolute assignment, and the reformation depends upon oral testimony, the question is for the jury, no matter how indisputable may be the proof. **MANWILLER vs. MANWILLER**, Adm'x., (No. 1), 175.

19. Question for Jury — Landlord and Tenant — Eviction — Waiver. FELIX vs. BREY, 204.

20. Real Estate—Parol Contract—Act 10 March, 1818, Sec. 1, 7 Sm. 79—Necessary Averments in Petition.

Petitioner claimed title to certain land under a parol contract between him and his deceased brother, and asked the Court to appoint a day for the examination of witnesses in support of the contract, under Act 10 March, 1818, Sec. 1, 7 Sm. 79, which applies to contracts not within the statute of frauds. Other claimants to the real estate filed an answer to the petition, averring want of jurisdiction. **Held:** that in order to take the case out of the statute of frauds the petitioner must establish and set forth in his petition the fact that the change of possession was notorious and the fact that it has been exclusive, continuous and maintained; and also that the petitioner has fulfilled his part of the alleged contract; and as none of these essentials were set forth in the petition, it must be refused. **IN RE FISHER'S PETITION**, 52.

21. Seduction—Evidence Requiring Cautionary Instructions to Jury—New Trial.

Plaintiff sued defendant for damages for the seduction of his wife, and recovered a verdict of \$1,500. The only evidence of the seduction was given by the wife, though both she and plaintiff testified that defendant had "admitted" and "confessed" his guilt, though they were unable to recall any language used by defendant fairly amounting to an admission. It appeared that the wife testified under the stress of what may have been a threat of abandonment, and though she said that the unlawful practices had continued for three years at weekly intervals, no witness was brought forward who observed anything suspicious between them. A prosecution for adultery had resulted in defendant's acquittal. On rule for new trial, **Held:** that in order to give to the verdict the conclusive effect ordinarily to be attributed to the verdict of a jury, the latter should have been cautioned about accepting the evidence without close scrutiny. Such cautionary instructions not having been given a new trial was granted. **REESER vs. RAHN**, 189.

22. Taxpayers—Right to Intervene in Suits.

To entitle a taxpayer to intervene in a suit against poor directors he must set forth in his petition that which affects the merits of the claim. The mere fact that the poor directors do not propose to contest the claim is not sufficient ground upon which to base intervention by a taxpayer. **BINGAMAN vs. POOR DIRECTORS**, 43.

PRACTICE, EQUITY.

1. Exceptions to Answers—Act 28 May, 1913, P. L. 358—Responsive Answer as Evidence.

In a suit in equity, an exception to defendants' answer that it does not indicate that the averments are upon the personal knowledge of each defendant, or of which of the defendants, and is therefore not responsive in the sense of being evidence in defendants' favor, will be dismissed, since the equitable rule which makes a responsive answer evidence for the defendant is abolished by Act 28 May, 1913, P. L. 358. **HARTGEN vs. HARTGEN**, Admr., 208.

2. Exceptions to Answers—Averments of Conclusions—Equity Rules 37 and 17.

An answer in equity averring that the transfer of the money in dispute was pursuant to a gift, but which avers no facts from which it can be determined whether the transfer was a gift, is insufficient and an exception thereto will be sustained.

An exception to an answer that it states conclusions will be dismissed where the corresponding paragraph of plaintiffs' bill itself contains a statement of conclusions, in violation of Equity Rule 17; for the defendant is not obliged to answer conclusions. **HARTGEN vs. HARTGEN**, Admr., 208.

3. Jurisdiction—Remedy at Law—Adequacy of Remedy.

While a person who has purchased shares of stock upon misrepresentations may have a remedy at law, nevertheless he has no adequate remedy except in equity, in order to be relieved from the relation and liability as a stockholder. **MEINIG vs. INTERNATIONAL MONEY MACHINE CO.**, (No. 1), 33.

4. Proceedings for Support by Deserted Wife—Service Outside Jurisdiction—Acts 6 April, 1859, P. L. 387; 23 May, 1907, P. L. 227; and 21 July, 1913, P. L. 867—Constitutionality—Legacy as Property.

Plaintiff filed a bill in equity against her husband and the executors of the will of his father, alleging desertion and non-support by her husband and asking for a decree that a suitable amount out of a legacy to which he was entitled under the will of his father should be taken and become liable for her comfortable support and maintenance. Upon plaintiff's affidavit that her husband was residing at Carrara, Nevada, the Court made an order for service of the bill and copy of the order upon him there under Act 6 April, 1859, P. L. 387, in accordance with the provisions of Act 23 May, 1907, P. L. 227, as amended by Act 21 July, 1913, P. L. 867. Upon return of the service counsel for the husband, *de bene esse*, moved to have the service set aside on the ground (1) that the property against which the proceeding was directed consisted of a legacy and was therefore not the kind of property designated in the Act of 1859, concerning which the manner of service is therein provided; (2) that service was effected on defendant in Tonopah, Nevada, instead of Carrara; and (3) that the Acts of 1859, 1907 and 1913, in so far as they be considered to authorize service outside the jurisdiction are at variance with the constitution and laws of the United States, and are void.

Held: sustaining the service, that (1) the kinds of property designated in the Act of 1859 are without significance, as the Act of 1913 provides that "proceedings may be had against any property, real or personal, of said husband," which includes a legacy, though not yet distributed, because a legacy is property and vests in the legatee upon the death of the testator; and the Act of 1913 refers to the Act of 1859 only to direct that service shall be made in the manner provided by that Act; (2) that service on defendant at Tonopah instead of at Carrara, both being in the same county in Nevada, was proper, though the order for service referred to Carrara. The Act of 1859 provides that the order for service shall be made after it shall be made to appear to the Court by affidavit in what place or county such defendant resides or is or probably may be found, and authorizes the Court to direct that service be made wherever he may reside or be found. The order directing service to be made "at the place aforesaid," referring to Carrara, contained a requirement not provided for in the Act of 1859; (3) that the Acts of 1859, 1907 and 1913 are not unconstitutional for the reason that the proceeding is in *rem* and not in *personam*, and is against property within the jurisdiction of the Court. The purpose of the order for service was not to bring the defendant within the jurisdiction, but to give him notice to defend his property, if he had any defence. **NOLDE vs. NOLDE**, 1.

5. Purchase of Shares of Stock—Misrepresentation—Rescission—Notice and Tender. **MEINIG vs. INTERNATIONAL MONEY MACHINE CO.**, (No. 1), 33.

6. Receivers — Corporations — Pending Suits. SNYDER vs. REICHART CLEANING AND DYEING CO., (No. 1), 81.

PRACTICE, Q. S.

1. Charge of Court—Witnesses—Character Witness.

Where a character witness undertakes to swear that the defendant's reputation for honesty was good, and then admits under cross-examination that prior to the theft of which the defendant was accused, he did not know a single person in the neighborhood who knew the defendant, the Court properly charged that the jury must consider the witness' means and opportunity of knowing the defendant's reputation. COM'TH vs. BROWN, 57.

2. Charge of Court—Witnesses—Credibility.

Contradictions in a witness' testimony always affect the credibility of the witness, and calling the jury's attention in the charge to such contradictions is proper. COM'TH vs. BROWN, 57.

3. Costs—Duplication—Two Indictments. COM'TH vs. POTTEIGER, 180.

4. Reargument—New Evidence.

A reargument of a rule for new trial will not be granted to a defendant, convicted of felonious breaking in, where the new evidence, as shown by depositions, consists of statements which on their face appear improbable and are contradictory to evidence given by the defendant himself at the trial. COM'TH vs. HEISLER, (No. 2), 188.

PUBLIC SERVICE COMMISSION.

1. Approval of Contract—Jurisdiction of Court—Validity of Contract. ROTHERMEL vs. SUPERVISORS OF MUHLENBERG TWP, 183.

RAILROADS. (See Negligence).

REAL ESTATE.

1. Building Restrictions—Construction.

Where, in a suit in equity to restrain the building of a porch or terrace adjacent to a dwelling, alleged to be in violation of a building restriction, the determination of the rights of the parties depends on the interpretation to be given to the word "building" in the restricting agreement, of which there was insufficient evidence at the trial, the case will be referred back for further testimony. DEELMAN vs. SHERMAN, 182.

2. Conveyance by Husband to Wife—Presumptive Gift. NATIONAL UNION BANK vs. FRANKHOUSER, 195.

3. Damages from Change of Grade of Street—Appointment of Viewers—Unauthorized Release by Husband for Wife's Property—Estoppel.

A wife who is the owner of property that was damaged by the relocation of a street is not barred from asking for the appointment of viewers to assess the damages to her property, although the Borough, believing that her husband was the owner, had agreed upon a settlement of the claim and had received a release

from the husband upon the Borough's agreement to make certain improvements to the property, which had been substantially completed. The fact that the wife was aware of the work being done and probably had reason to believe that it was being done by the Borough, is not sufficient to constitute an estoppel. *SHANEMAN vs. WEST READING BORO.*, 132.

4. **Parol Contract—Act of 1818—Necessary Averments.** *IN RE FISHER'S PETITION*, 52.

RECEIVERS. (See Corporations).

REGISTER OF WILLS.

1. **Official Bond—Forfeiture—Granting Letters Testamentary to Non-Resident Without Exacting Bond.**

M, domiciled in Massachusetts and doing business in Reading, Pennsylvania, died testate and appointed McCarthy, a resident of Massachusetts, and Gherst, a resident of Reading, as his executors. The will was probated in Massachusetts and ancillary letters were issued to the executors in Reading by Gregory, Register of Wills of Berks County, without his requiring a bond from McCarthy, a non-resident, as stipulated by Act 15 March, 1832, Sec. 16, P. L. 135. Gregory's official bond was for \$30,000, conditioned upon his faithfully executing the duties of his office as Register of Wills. Gherst and McCarthy mismanaged the estate, were subsequently denied commissions and were surcharged \$49,000 by the Orphans' Court, and, McCarthy having been removed as ancillary executor, it was ordered that the surcharge be paid by Gherst and McCarthy to Gherst, executor "for distribution in this estate." It was further ordered that after payment of claims of Pennsylvania creditors the balance should be paid to Gherst and McCarthy, the Massachusetts executors, to be distributed under the order of that court. The surcharge was not paid and suit was brought by Gherst, executor, against Gregory and the Trust company, surety on his official bond, to recover \$30,000, the amount of the bond, because of Gregory's failure to exact a bond from McCarthy.

The defendants contended that the letters to McCarthy having been void, the Orphans' Court was without jurisdiction to adjudicate the account of the executor *de son tort*, and that therefore the defendants in this suit not being parties to the proceeding, were not bound by any decree or adjudication made by the court. Defendants also denied injury on account of the surcharge, and averred that the money complained of as being unpaid is in the hands of the Massachusetts executors subject to an accounting in that court. The verdict was for the plaintiffs.

Held: refusing a new trial and judgment *n. o. v.*, that the evidence showed that McCarthy had submitted himself to the jurisdiction of the Orphans' Court; that defendants' affidavit of defense must be held to admit non-payment of the surcharge, and that the estate had suffered injury thereby to the extent of \$49,000. *COM'TH, TO USE OF GHERST, EX'R, vs. GREGORY AND BERKS CO. TRUST CO.*, 137.

RULES OF COURT.

1. **Equity Rules 37 and 17. Averments of Conclusions.** *HARTGEN vs. HARTGEN, ADM'R*, 208.

STATUTES.

1. **Construction—Legislative Definition of Terms.**

A legislative definition of terms employed in a Statute is binding upon the Courts.

The construction put upon a Statute by the public authority charged with its administration, and therefore with its interpretation in the first instance, has a peculiar claim upon the consideration of the Courts. *MERTZ vs. GREENWICH TWP.*, 118.

2. Interpretation—Punctuation.

Punctuation is not a controlling part of any enactment, yet it has been repeatedly held that it may be looked at as some indication of meaning. It is probably safer in the interpretation of a statute like this to adhere to the exact language used, as punctuated, especially where the right thereby given is the broader right and makes in favor of the possibility of a review by the appellate courts of the action at nisi prius. *QUINTER vs. QUINTER*, 87.

TOWNSHIP SUPERVISORS.

1. Contracts for Lighting Streets of Village—Petition by Owners of Less Than Majority of Frontage—Tax Levy—Injunction—Act 28 May, 1913, P. L. 371.

The Act of May 28, 1913, P. L. 371, authorizes township supervisors of townships of the second class, upon petition of the owners of a majority of the lineal feet frontage along any highway or portion thereof in any village within the township to enter into contract with a lighting company to illuminate the streets and highways. Where such petition asks for the illumination of the highways of a village, it is to be considered as a petition to illuminate all the highways of the village, and if it is not signed by the owners of a majority of the lineal feet frontage along all the highways, the supervisors have no authority to contract, and a contract entered into by them with a lighting company will be declared void, and a tax levy to pay the cost of the lighting will be restrained. *ROTHERMEL vs. SUPERVISORS OF MUHLENBERG TWP.*, 183.

WATER COURSES.

1. Rights of Riparian Owners—Prescriptive Right to Use—Water—Waste—Equity—Injunction.

Where the owner of a mill operated from a dam in a stream, allows the dam-breast, head-race, fore-bay and pen-stock to remain in a state of disrepair, whereby a large percentage of the water from the stream leaks away and is wasted, thus depriving a lower riparian owner of the use of the water, which, if not thus wasted, would pass to his property, and its loss is an injury to his manufacturing plant on the stream, the upper riparian owner will be restrained by injunction from allowing the water to be wasted by lack of proper repair. *ALLENTOWN PORTLAND CEMENT CO. vs. HUY*, 54.

WILLS.

1. Bequests.

A clear and direct bequest or devise will not be affected by a later clause of doubtful import. *MARBURGER'S EST.*, 65.

2. Construction.

Decedent's will provided that a portion of his estate should be held in trust and one-third of the income therefrom was to be paid to his son Charles, and two-thirds for the support of Charles' daughter, Eva May, until she reached the age of twenty-one years.

after which her share of the income should be allowed to accumulate until the death of Charles, when the principal of the fund was to be divided among the children of Charles. He further provided that in case Eva May should be physically unable to support herself when she arrived at the age of twenty-one, the trustee should continue paying her the two-third income from the fund. After Eva May became twenty-one years old, she was incapable of self-support. Charles died, leaving eight children, including Eva May, who claimed that the trust should be continued and the two-thirds income paid to her. **Held:** that the provision that the income should be paid to her after she reached the age of twenty-one years in case she was incapable of self-support meant that she was only to receive it until her father's death, and that the fund was distributable to the heirs of Charles. *MARBURGER'S EST.*, 65.

3. Construction—Bequest of Business by Testatrix.

Testatrix provided by her will that certain factories owned by her should be operated by three of her sons, the "upper" factory to be in charge of her son Harry and the "lower" factory in charge of her sons James and Daniel; the profits of the factories to be equally divided among the three, who should, however, pay a certain sum each month to her other children as rental; that if Harry should decide to withdraw from the "firm" the other two sons should have the first right to purchase his share, at a price to be fixed by an appraisement; that the factory buildings should not be sold unless the three children mentioned, and all the others, declined to continue the business, in which event the executor was directed to sell the factories and divide the proceeds equally among the children.

A further provision in the will stipulated that all of the bills due the factories at the death of the testatrix should be used to pay the debts and the balance remaining should be divided among certain children and if the money should be insufficient to pay the debts the deficiency should be assumed by Harry, James and Daniel.

Harry, James and Daniel took over the operation of the factories, and subsequently the shares of James and Daniel were purchased by Harry; he thereupon expanded the business with his own capital and installed additional fixtures and conducted the business as his own.

Two of the heirs filed a petition in the Orphans' Court asking for an order upon Harry to account for the profits of the business and asked also for his removal from the executorship of the estate. **Held:** dismissing the petition, that under the terms of the will the business was given to Harry, James and Daniel, and that they were entitled to all profits; that Harry, having purchased the interests of his brothers, was entitled to operate the business as his own, being accountable only for the value of the machinery and merchandise in the factories at the time of the death of the testatrix. *WEBER'S EST.*, (No. 1), 73.

4. Construction—"Children" as Word of Purchase.

"All authorities agree that 'children' is *prima facie* a word of purchase, and that it cannot be construed otherwise unless the context plainly shows that the testator did not employ the word in its ordinary sense." *BAUS, TRUSTEE, vs. JOHNSON*, 228.

5. Construction—Inconsistent Provisions.

Testatrix, by her will directed that two factories owned by her should be operated by three of her sons, among whom the profits should be equally divided, and who should pay to her other chil-

dren a monthly sum as rental. She further provided that if Harry, one of the sons, should wish to withdraw from the "firm," the other two sons operating the business should have the first right to purchase his share at its appraised value. A subsequent clause stipulated that the three sons should each receive \$15 per week for their labor out of the profits of the factories. The three sons operated the factories and subsequently Harry purchased the interest of the other two, put in additional capital and operated the business as his own. Two of the other heirs asked for an order upon him to account to them for the profits of the business, claiming that he was merely trustee for the heirs. **Held:** that the provisions of the will permitting Harry to sell his share extended by implication to his two brothers; that although the provision for paying salaries out of profits seems inconsistent with the previous disposition of profits to the same persons, yet the Court will not go so far as to conclude from what at best is an inconsistency, that a trust relation between the sons and the estate was established covering the business. *WEBER'S EST.*, (No. 2), 147.

6. Construction—Life Estate or Fee—Rule in Shelly's Case.

Testator's will provided as follows: "I give and bequeath all my * * * real and personal estate * * * unto my husband, James Baus, his heirs, administrators and assigns to and for his absolute use and benefit during his lifetime; and whatsoever remains after his death to his children or heirs share and share alike." At the time of the making of the will the husband had three children and a grandchild. It was contended that under the Rule in Shelly's Case the husband took a fee simple estate. **Held:** that the testatrix's intention, as gathered from the will, was to use the word "children" in its ordinary sense, not as a word of limitation but of personal description; that she intended the children to take the remainder directly from her as her devisees, since she used the words, "or heirs," meaning not his heirs but the heirs of the children, there then being one grandchild; and that James Baus took only a life estate. *BAUS, TRUSTEE, vs. JOHNSON*, 228.

7. Descent—Per Capita or Per Stirpes.

Decedent gave his whole estate to his wife for life. He provided that after her death it should go to his three children, Joseph Harvey, Emma Crealman and Kate Harvey, during their natural lives, in equal shares, "and after the death of either of said children named, then the same shall go to my grandchildren and their heirs and assigns forever, but should my daughter, Kate Harvey, die without children, then her share shall be divided equally among the children of my son, Joseph Harvey, and my daughter, Emma Crealman." Decedent's widow died, and subsequently his three children. Joseph was survived by two children, Emma by a great-grandson, and Kate died without issue. The children of Joseph asked for a citation to show cause why an inquest in partition should not be awarded, and alleged that they were each entitled to a one-third interest in the estate, on the ground that they took per capita with Emma's grandson. The latter contended that the grandchildren took her stirpes and that he was therefore entitled to one-half of the estate. **Held:** that testator's estate, at his death, vested in the grandchildren in two shares, per stirpes, subject to be divested to the extent of reducing their shares to create a third in case Kate Harvey left no children; since such partial divestiture never occurred, they now take the estate in two equal shares by representation of their parents—Joseph's children taking one and Emma's grandson the other. *HARVEY'S EST.*, 113.

8. Legacies—Construction—Intention of Testator.

Testator bequeathed to the Reading Trust Co., \$1,000 in trust, the interest to be paid to "the widow of Henry Beyerle, my deceased nephew, for and during and until their youngest child shall have reached the age of 21 years; when the said Reading Trust Co. shall pay over the principal sum of \$1,000 to the three children of Henry Beyerle, deceased, share and share alike; provided, however, that should all of said children have arrived at legal age at the time of my wife's decease, then the said principal sum shall at once be equally divided to and among the said three children of Henry Beyerle." Henry Beyerle had a child, Carrie Geiss, with his first wife from whom he was divorced, and three with his second wife, referred to in the will as the "widow of Henry Beyerle." Carrie Geiss claimed an equal share in the legacy with the three children of the second wife, on the ground that testator intended it to go to all the children as a class, and by mistake he understated the number of children. There was no evidence that claimant ever lived with testator; that any friendly relations existed between them, or that he ever manifested any interest in her; but there was evidence that testator often visited the family of the second wife and the three children and that he did much for them. **Held:** dismissing the claim, that the first object in the construction of a will is the carrying out of the intention of the testator; and that in the light of the language employed in the will and the parol evidence, he did not intend the whole class of children to take and was not mistaken in the number, but used the words "the three" to designate the children of the second wife, who were to be the objects of his bounty. **WALTER'S EST.**, 167.

9. Legacies—Vested or Contingent.

Testator devised all his real and personal property to his wife for life. After her death the executor was to convert the entire estate into money, to be distributed as follows: "After the whole of my estate has been converted into money then I give and devise the same to be equally divided between my four children, Sarah Amanda, Anna, Elmer and George." Sarah Amanda and Anna died before the widow. **Held:** that their shares under the will vested at the death of testator, and were distributable to their personal representatives, the power of sale in the will having worked a conversion. **DAVIDHEISER'S EST.**, 97.

10. Legacy of Personal Property—Life Estate with Power of Consumption—Distribution of Residue.

Where, upon the death of a life tenant, there remains a residue of a fund given to him with power of consumption, the residue is distributable to the remaindermen. **GRUBER'S EST.**, 68.

11. Legacy to a Class of Persons—Mis-statement of Number.

Where a testator refers to a class of persons, as the objects of his bounty, but, in an attempted enumeration, omits to name one or more of them or in describing them specifies a number which is less than the actual number, the parties omitted may still take and will be included, unless there be something to show the omission was of purpose. **WALTER'S EST.**, 167.

12. Partial Intestacy—Widow's Claim Under Interstate Laws. KIRBY'S EST., 94.**13. Stipulation as to Executor's Compensation—Additional Compensation—Exceptional Services.**

The general rule that where an executor accepts the office with knowledge of a provision in the will fixing his compensation, he

is ordinarily bound thereby, is not controlling where it appears that at the time of the acceptance of the trust the estate appeared solvent and easy of settlement, but that upon the death of the co-executor unexpected difficulties arose resulting in litigation in New York State, which, solely by reason of accountant's efforts, greatly benefited the estate. Such a case presents an exception to the general rule and additional compensation should be allowed. *LANDIS' EST.*, 242.

14. Words and Phrases—"Among"—"Divided Equal."

Although the word "among" is generally used as a distributive preposition implying a division among more than two, it will not be decisive of the testator's intention, where the rest of the will indicates that he was not grammatically correct in other instances. Moreover, the word "among" is not infrequently used interchangeably with "between" and the grammatical distinction is not always observed.

The words "divided equal" in distributions does not necessarily import a per capita distribution because the expression is not conclusive one way or the other, it being appropriate, not only to a division among individuals, but also to a division between classes or between an individual and a class. *HARVEY'S EST.*, 113.

WITNESSES.

1. **Credibility—Contradictions in Testimony—Character Witness.** *COM' TH vs. BROWN*, 57.

WORDS AND PHRASES.

1. **"Actually Engaged"—"Condition of the Premises"—Workmen's Compensation Law.** *HEMMING vs. FISHER*, 119.
2. **"Among"—"Divided Equal"—Wills.** *HARVEY'S EST.*, 113.

WORKMEN'S COMPENSATION.

1. **Appeal—Workmen's Compensation Act of 1915.**

The Workmen's Compensation Board found as facts that the claimant after completing work for the day and while on the premises of defendant, descending steps from the third to the second floor of the building in which she was employed, fell and sustained injuries; that she had finished her work for the day, and that the stairway was well lighted and in good condition, and that the accident was not caused by the condition of the premises, nor was it due to the operation of the employer's business or affairs thereon. **Held:** that while the Act of 1915, Sec. 301, second paragraph, makes certain injuries compensable where the employee is not actually engaged in the furtherance of the business or affairs of the employer, yet, in order to have a claimant come within this class, the injuries must be caused either by the condition of the premises, or by the operation of the employer's business or affairs upon the premises; both of which are negatived by the Board's findings of fact which are conclusive upon the Court. *HEMMING vs. FISHER*, 119.

2. **Appeals.**

An appeal to Court from the decision of the Workmen's Compensation Board does not lie upon questions of fact, but only upon questions of law. *SHEPHERD vs. SCHLEGEL*, 49.

3. Appeal From Decision—Hearsay Evidence.

Where a person dies as the result of a slight scratch on the nose which became infected, and the only evidence as to the source of the injury and of the place where it occurred is the testimony of three witnesses, relatives of the deceased, who testified that they heard deceased say that a piece of lumber hit him on the nose while he was working, producing a scratch, the claimant has failed to sustain the burden of proof resting upon her to show that the death of the decedent was caused by an injury sustained while in the course of his employment. The evidence, not being part of the *res gestae*, was merely hearsay which, although admissible in hearings before the workmen's compensation board because it may lead to the discovery of substantive evidence that will conclusively determine the real facts of the case, yet is not of itself evidence upon which a decision can be founded. *SHEPPERD vs. SCHLEGEL*, 49.

4. Words and Phrases—"Actually Engaged"—"Condition of the Premises."

"Actually" as we are taught by the lexicographers, and are accustomed to use it in ordinary speech, means "really," "in fact," as opposed e. g. to "theoretically," "constructively," and the like.

"Actually engaged" therefore means engaged in reality and fact according to the sense the phrase would have in ordinary parlance. Therefore, an employee who has quit work for the day and started on his way home cannot be said to be "actually engaged" in the furtherance of the business of the employer.

The phrase "condition of the premises" manifestly relates to the state of repair, convenience or safety, etc., of the place of employment and is not synonymous with and does not cover the location of it with reference to the stories of the building in which it is. *HEMMING vs. FISHER*, 119.

